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Montesquieu and the history of French laws

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Notes on the system of references to Montesquieu

De l'esprit des lois: references to Books and chapters in the text are given as: e.g. *Lois*, XXVIII, 21. References to editorial notes are given as: e.g. *Lois*, Book XXX, Note 16. The edition used, unless otherwise stated, is *De l'esprit des loix*, texte établi et présenté par Jean Brethe de La Gressaye, Paris 1950-1961. Vol. iv contains Books XXVII-XXXI.

Other original works by Montesquieu

Unpublished

Collectio juris, ms in Bn, n.a.f. 12837-42, 6 vols.

Published

References are usually given to two editions:

Œuvres complètes de Montesquieu, publiées sous la direction de m. André Masson, Paris, Nagel, 1950-1955. These are called Nagel i, ii, and iii. Nagel i has three series of pagination, referred to as A, B, and C.

Œuvres complètes de Montesquieu, texte présenté et annoté par Roger Caillois, Paris (Pléiade) 1949-1951.

The text of quotations follows the Pléiade edition, except for the *Correspondance*, which is included in the Nagel edition only.

References are given as follows:

Lettres persanes: e.g. *L.P.*30, Nagel iC.65; Pléiade i.176.

Considérations sur la grandeur des Romains et de leur décadence: e.g. *Considérations*, Nagel iC.412; Pléiade ii.117.

Pensées: e.g. *Pensées*, Nagel ii (1540), 443-45; Pléiade i (1953), 1473-75. Nagel ii numbers according to the paragraph in the order of the manuscript; Pléiade i follows roughly the edition *Pensées et fragments inédits*, edited by H. Barckhausen, Bordeaux 1899-1901.

Spicilège: e.g. *Spicilège* 561 (ms p.521), Nagel ii.848; Pléiade ii.1369. Nagel ii numbers consecutively; Pléiade ii follows the actual pagination of the manuscript which includes some blank or spoilt pages.

Correspondance: e.g. *Correspondance*, Nagel iii.1116. Names and dates are given in the notes if not in the text. Not in Pléiade edition.

For other published works Nagel and Pléiade references are given in similar form.

Spelling has been modernised in the quotations.

Abbreviations

Best.D	Voltaire, *Correspondence and related documents*, definitive edition by Theodore Besterman, Genève, Banbury, Oxford 1968-1977
Bn	Bibliothèque nationale
Biographie universelle	*Biographie universelle ancienne et moderne*, Paris 1843-1865
D.B.F.	*Dictionnaire de biographie française*, Paris 1933-
D.L.F.	*Dictionnaire des lettres françaises*, Paris 1951-1973
FHS	*French historical studies*
N.B.G.	*Nouvelle biographie générale depuis les temps les plus reculés jusqu'à nos jours*, Paris 1857-1866
RhlF	*Revue d'histoire littéraire de la France*

Preface

THE object of this study is to consider Montesquieu's achievement as a historian of French civil and constitutional law. To do this, it is necessary to follow him in his researches in this field. It is a journey well worth making in such company, for this author, though he is sometimes difficult, is never dull. His imagination and style illuminate the past and reward the present.

The study is concerned chiefly with books XXVIII, XXX and XXXI of *De l'esprit des lois*. These will be called the 'historical' books. However, it has seemed essential also to see how these books, and the research which went into them, relate to the whole work, to look also at Montesquieu's methods and qualifications as a historian, and to discuss where he stood in relation to other historians of the time, as well as to the constitutional struggles of eighteenth-century France. Within this wider context the work explores the direction and value of the historical research undertaken by Montesquieu.

We shall begin by re-examining the constitutional theories propounded in *De l'esprit des lois*. It seems worthwhile to do this once more, for two reasons. Firstly because, though many people believe they know what Montesquieu said, they do not always appreciate the complexity of his approach, which conceals a fundamental consistency. The second reason is that the historical books may appear puzzling and obscure in construction, perhaps extraneous to the work as a whole, unless it is realised that Montesquieu uses historical developments in France to illustrate in practice a type of the moderate state which he has previously described in the abstract.

Chapter 4 brings together information from various sources concerning Montesquieu's education, his legal practice, his work with the Academy of Bordeaux and his election to the Académie française, and includes a brief look at his private studies and notes, and his published work before *De l'esprit des lois*. His studies and experience were the qualification he brought to his work as a historian and they seem, judging by the results, to have equipped him well for the task.

The sources used for the historical books are identified in this study, and an attempt is made to assess their value and relevance for the purpose, as well as the value of Montesquieu's contribution to the understanding of the way in which French law developed. This involves some acquaintance with the most eminent textual scholars of the sixteenth, seventeenth and eighteenth centuries and with the texts they edited: the codes of law dating back to the fifth century A.D., the capitularies and ordinances of the kings of France, the lives of kings and saints, such as Charlemagne, Saint Agobard and Saint Louis, and many 'abstracts and brief chronicles of the time'. The study involves also some consideration of Roman law and French customary law, of legal practice in eighteenth-century France, and of the constitutional role of the *parlements*.

I should like to thank m. Louis Desgraves, Inspecteur-Général des Bibliothèques, for suggesting that I should examine the unpublished notebooks known as the *Collectio juris* and m. Roger Pierrot, Conservateur en Chef of the

Département des Imprimés at the Bibliothèque nationale, for his help, and that of his staff, in identifying the loans to Montesquieu recorded in the registers of loans of the Bibliothèque du Roi for the years 1747 and 1748. I am grateful to m. Jacques Yvon, Conservateur en Chef of the Bibliothèque municipale at Bordeaux, and his staff, as well as to the staff of many other libraries in England and France. I am grateful also to the Central Research Funds Committee of the University of London for assisting me with two journeys to Bordeaux and Paris, to further my research. My thanks are due also to professor Robert Shackleton for his very valuable and expert advice, and to professor William Barber, who advised and sustained me throughout the preparation of this work.

Finally, I wish to thank my family and friends, who have given me so much help by their interest and particularly with proof-reading and compiling the index.

1. The theory of governments

MONTESQUIEU was a lawyer and his major work, *De l'esprit des lois*, bears the marks of his profession. The purpose of this work is to examine types of civil and constitutional laws in their relationship to the individuals and the societies which have produced them and are governed by them. Like an advocate making a case, Montesquieu follows a line of demonstration, and to support it he brings in acts, decrees, accepted customs, interpretations, precedents. When at the end of the work in Books XXVIII, XXX and XXXI he turns to French history, it is in order to illustrate his major theme by examples drawn from his own country. The purpose of the present enquiry is to examine the theory he intended to demonstrate in these books, the scope and validity of his historical methods, and to consider how his work as a historian of French civil and constitutional law forms part of the pattern of his life and his wide-ranging studies.

The most straightforward way of beginning this enquiry seems to be to consider the theory of governments put forward by Montesquieu in the earlier books of the *Lois*. It will then be possible, when we look at the three historical books, to consider how these are related to the theory of governments. Montesquieu himself does not ever explain the relationship, but leaves his readers to draw their own conclusions. However if the history is not considered in relation to the theory, the three books lose their relevance to the work as a whole. They appear only as an excursion through the early and middle ages of French and European history, with no particular point to the exercise. No doubt it was easier for the contemporary French public to understand Montesquieu's message than it is for the modern reader. Among educated Frenchmen of the time there was a fairly recently awakened interest in the history of their own country. Discussion about the relevance of this history to their actual political situation had developed, and was to continue with increasing momentum up to the Revolution. We need to put ourselves back into Montesquieu's own ideas and into the ideas of the time to understand what he wrote. If we try to understand him in the light of more recent political theories we shall mistake his meaning. As he himself said: 'Transporter dans des siècles reculés toutes les idées du siècle où l'on vit, c'est des sources de l'erreur celle qui est la plus féconde' (*Lois*, XXX, 14).

Jean Brethe de La Gressaye in his introduction to tome iv of the *Lois* (Books XXVII-XXXI) refers to the three books on French history as appendices. He says (p.xii) that Montesquieu 'a failli ne pas traiter des origines des lois françaises, et finalement il a été plus loin qu'il ne l'avait prévu'. This opinion is based mainly on the letter Montesquieu wrote to mgr Cerati from Paris on 28 March 1748:[1]

J'ai pensé me tuer depuis trois mois afin d'achever un morceau que je veux y mettre, qui sera un livre de l'origine et des révolutions de nos lois civiles en France. Cela formera trois heures de lectures, mais je vous assure que cela m'a coûté tant de travail que mes

[1] *Correspondance*, Nagel iii.1116

cheveux sont blanchis. Il faudrait pour que mon ouvrage fût complet, que je pûsse achever deux livres sur les lois féodales. Je crois avoir fait des découvertes sur une matière, la plus obscure que nous ayons, qui est pourtant une magnifique matière. Si je puis être en repos à ma campagne pendant trois mois, je compte que je donnerai la dernière main à ces deux livres: sinon mon ouvrage s'en passera.

Far from indicating that the historical books do not form an integral part of the *Lois*, this passage seems to indicate that they do. They are required 'pour que mon ouvrage fût complet'. When he began to prepare his work for printing in 1746-47 he talked of 30 books and Jean Brethe de La Gressaye recognises that 'il avait sans doute en vue les derniers livres historiques, qui n'étaient pas encore rédigés mais qui, certainement étaient déjà préparés par ses lectures et les idées qu'il s'était faites sur les origines du droit français'.[2] What seems to have happened is that he left until the last the work of writing the books concerned with the development of French laws in a form suitable for inclusion in the *Lois*, and then found that he had underestimated the time required for summarising processes which had taken many hundreds of years to come about, and for selecting and verifying the references he needed. By March 1748 when he wrote to mgr Cerati, he was realising what was involved. Yet already Jacob Vernet, Montesquieu's confidential agent in Geneva, was grumbling at the printer for his slowness. Vernet refers to this in a letter dated 16 March 1748 to Montesquieu in which it appears that the first tome is finished and the second well advanced, and that 'on promet d'aller plus vite à l'avenir'.[3] No wonder that Montesquieu contemplated for a little while the possibility of letting the work appear without the last two books on the feudal laws. His hesitation was short-lived however. By 29 June 1748 Vernet was writing to acknowledge receipt of Book XXVIII on the civil laws and encouraging the author to persevere with the books on the feudal laws.

Montesquieu, no doubt, attached importance to the three books on French history because he intended them to illustrate a thesis that was very dear to him. This was that the land now called France was, by origin and development, a state with a moderate type of monarchical government; that it was not, and never since the Germanic invasions took place had been, either a democracy or a despotism. To appreciate what he meant by these terms, and to understand the importance of his thesis, it is necessary to set the historical books in the context of the *Lois* as a whole.

The idea of the state logically precedes, yet cannot in practice be separated from, the idea of the way in which the state is governed. Montesquieu begins by talking about man as 'fait pour vivre dans la société' (*Lois*, I, 1), and when he begins to discuss society, he immediately distinguishes between the different types of government – republic, monarchy and despotism. The idea that the object of society is the general good of its members is implicit in his theories, but is only stated indirectly in the third chapter of Book I: 'le gouvernement le plus conforme à la nature est celui dont la disposition particulière se rapporte mieux à la disposition du peuple pour lequel il est établi'. It is necessary to take

[2] *Lois*, t.iv, Introduction, p.xi.
[3] *Correspondance*, Nagel iii.1108.

this assumption into account in order to understand what he has to say about particular societies.

Almost at the beginning of the work he explains very succinctly what he means by the terms 'republic', 'monarchy' and 'despotism': 'le gouvernement républicain est celui où le peuple en corps, ou seulement une partie du peuple, a la souveraine puissance; le monarchique, celui où un seul gouverne, mais par des lois fixes et établies; au lieu que, dans le despotique, un seul sans loi et sans règle, entraîne tout par sa volonté et par ses caprices' (*Lois*, II, 1).

From the nature of the different types of government, some consequences flow directly and are basic to them. Each government is characterised by a principle which exerts a supreme influence on the laws of the state and the lives of the citizens. Montesquieu defines the nature of a state as 'sa structure particulière' and its principle as 'les passions humaines qui le font mouvoir' (*Lois*, III, 1). In Book III he sets out to study the principles which are the 'ressorts' or motives for action, which must be accepted in each type of state in order that it should function. These can only be understood if they are considered alongside the institutions which form the 'structure particulière' of the different governments.

A republic, according to Montesquieu, can be either a democracy or an aristocracy: 'Lorsque [...] le peuple en corps a la souveraine puissance, c'est une Démocratie. Lorsque la souveraine puissance est entre les mains d'une partie du peuple, cela s'appelle une Aristocratie' (*Lois*, II, 2). He explains in Book II chapter 2, that the first things to be decided in a democracy are the ways in which the public will should be expressed. He thinks it essential that the people as a whole should decide what the law is to be, but not that they should carry on the day-to-day running of the state, as this would be too cumbersome: 'Le peuple a toujours trop d'action ou trop peu. Quelquefois avec cent mille bras il renverse tout; quelquefois avec cent mille pieds il ne va que comme les insectes.' So a constitution must be devised to provide for the election of assemblies and ministers to do the work of government. In the next chapter, he discusses aristocracy, a term which he applies to any state in which the sovereignty does not reside either in the people as a whole or in a single person. He sees such a state as a democracy so far as the ruling citizens are concerned, and as a monarchy or despotism for the others. He regards an aristocracy as becoming more perfect in the measure that it approaches a democracy; that is it becomes better in so far as more citizens are associated with the ruling process either directly or indirectly, fewer have inferior status and the latter are less oppressed by the former: 'La plus imparfaite de toutes est celle où la partie du peuple qui obéit est dans l'esclavage civil de celle qui commande, comme l'aristocratie de Pologne, où les paysans sont esclaves de la noblesse' (*Lois*, II, 3).

He concludes that the principle or motive for action in a republic, whether democracy or aristocracy, must be 'la vertu'. This is a 'vertu politique' which he describes as 'l'amour pour la partie, [le] désir de la vraie gloire, [le] renoncement à soi-meme, [le] sacrifice de ses plus chers intérêts, et [...] toutes ces vertus héroïques que nous trouvons dans les anciens, et dont nous avons seulement entendu parler' (*Lois*, III, 5). This political virtue, which consists in putting the public before the private good, must exist in the people as a whole

in a democracy since they both make the law and choose those who arrange for it to be carried out. In an aristocracy, the rulers need to practise political virtue in a spirit of moderation between themselves, though, so far as those who are ruled are concerned, the public good should be safeguarded by the laws which they do not make and apply, but obey.

A monarchy is a state in which 'un seul gouverne mais par des lois fixes et établies' (*Lois*, II, 1). Montesquieu explains that it is fundamental to the structure of a monarchy that there should be between the prince and the people intermediate powers ('pouvoirs') which act as the channels of power ('puissance'); 'car, s'il n'y a dans l'Etat que la volonté momentanée et capricieuse d'un seul, rien ne peut être fixe, et par conséquent aucune loi fondamentale' (*Lois*, II, 4).

A monarchy, considered as an organisation for producing the general good of its members, is extremely efficient because it can work well with a very small expenditure of 'vertu', or political virtue. If the laws are framed well and prudently, the state can flourish; the laws take the place of political virtue on the part of the citizen: 'Comme, dans les plus belles machines, l'on emploie aussi peu de mouvements, de force et de roues qu'il est possible' (*Lois*, III, 5). The principle which must inspire citizens of a monarchical state, in Montesquieu's view, is not 'vertu' but 'honneur', which is the ambition to stand well in the world, to be respected by others. This, in a 'monarchie bien réglée' will lead everyone to act more or less as a good citizen, and 'il se trouve que chacun va au bien commun, croyant aller à ses intérêts particuliers' (*Lois*, III, 7).

In a despotism, however, 'l'honneur' and 'la vertu' are equally out of place on the part of the citizens. The motive for obeying the sovereign cannot be ambition or the desire to stand well in the world, for all are equally without a secure position of their own, equally subject to the despot; the motive can only be fear. The absolute authority of the prince is exercised by those to whom he delegates it. These others have no rights of their own; they must be instantly answerable to the despot and, if they are not, then so much the worse for the people; 'le peuple n'a plus de protecteur' (*Lois*, III, 9).

From Montesquieu's apparently cool assessment of the different types of government, one might think that he would not be prepared to advocate for his own country one type in preference to any of the others. One might suppose that he was leading up to the conclusion that any type of government can work well and that it will produce good results, provided the laws are good, or the despot has the public good in mind, and the citizens obey, whatever their motives for doing so. This is not the case. His preference for monarchy as the best government for France becomes apparent as the work proceeds.

At the beginning of Book VIII, he says that the downfall of any government nearly always has its origin in the corruption of its principle. He is saying that when the motives for obedience cease to seem valid to the citizen, the form of the government is threatened and will change unless preventive action is taken. He examines the causes that lead to this corruption or breakdown and, from his examination there appear, as if by the way, his views on the advantages and disadvantages of the different types of government.

A properly working republic is a good form of government in Montesquieu's opinion. However, the ways in which its principle may be corrupted lead him

to conclude that the republican form is appropriate to small states only: 'sans cela elle ne peut guère subsister' (*Lois*, VIII, 16). In this, he was following the general opinion of his time and one which he had himself developed in his earlier work, the *Considérations sur les causes de la grandeur des Romains et de leur décadence.* He distinguishes again between democracy and aristocracy. A democracy will cease to be such, either when citizens cease to be equal as citizens, or when the spirit of equality is pushed to excess. In the first case the democracy becomes an aristocracy; in the second case the people, refusing to delegate their functions, try to act as senate, magistrate and judge – the result is chaos, from which first petty tyrants arise and then 'un seul tyran s'élève, et le peuple perd tout, jusqu'aux avantages de sa corruption' (*Lois*, VIII, 2). As for aristocracy, Montesquieu repeats his view that, for those who are ruled, it is either a monarchy with several monarchs or a despotism with several despots. If the rulers act according to law, they act as monarchs and the result is a very good type of state. The principle of aristocracy becomes corrupted when the ruling members act arbitrarily. The state then becomes a despotism with several despots and the republic ceases to exist except between members of the ruling class. Both democracy and aristocracy become unworkable in a large state, because there the spirit of equality (either between the people as a whole or between members of the ruling class) cannot long be sustained: 'les intérêts se particularisent; un homme sent d'abord qu'il peut être heureux, grand, glorieux, sans sa patrie; et bientôt, qu'il peut être seul grand sur les ruines de sa patrie' (*Lois*, VIII, 16).

Despotism is consistently portrayed as an evil system. It tends naturally to produce cruelty, fear, greed and laziness in ruler and ruled alike. The essence of despotism is that the law is not fixed but depends on the whim of the ruler (hence extreme liberty in a republic is also a kind of despotism). The result would always be anarchy, or in Montesquieu's words the state would perish 'par son vice intérieur', were it not kept in being by extraneous circumstances which oblige it to conform to a certain order. Montesquieu refers to 'des circonstances tirées du climat, de la religion, de la situation ou du génie du peuple' and concludes that, in relation to the despotic state, 'ces choses forcent sa nature sans la changer; sa férocité reste; elle est pour quelque temps apprivoisée' (*Lois*, VIII, 10).

Between republic and despotism lies monarchy. This, despite the drawbacks which he does not hesitate to spell out, Montesquieu regards as a desirable form of government for states of moderate size. In very small states, such as those formed by a single city, monarchy can hardly exist. The prince, if he acts within a legal system, is liable to find his power too restricted and he is easily tempted to extend this power and oppress the people, but on the other hand he is easily overthrown either by the people combining against him or by foreign invasion (*Lois*, VIII, 17). Neither can monarchy exist in a great empire. Montesquieu says that in such conditions only despotism can function because 'il faut que la promptitude des résolutions supplée à la distance des lieux où elles sont envoyées; que la crainte empêche la négligence du gouverneur ou du magistrat éloigné; que la loi soit dans une seule tête; et qu'elle change sans cesse, comme les accidents, qui se multiplient toujours dans l'Etat, à proportion de sa grandeur' (*Lois*, VIII, 19). Unless it is a despotism, a great empire will break up before

long. He cites the empires of Charlemagne, Alexander and Attila as cases in point. He adds: 'le prompt établissement du pouvoir sans bornes est le remède qui, dans ces cas, peut prévenir la dissolution: *nouveau malheur* après celui de l'agrandissement'.[4] For Montesquieu despotism is always a 'malheur', whatever the reasons for its establishment.

He shows the advantage of monarchy by contrasting it with despotism. 'Le gouvernement monarchique a un grand avantage sur le despotique. Comme il est de sa nature qu'il y ait sous le prince plusieurs ordres qui tiennent à la constitution, l'Etat est plus fixe, la constitution plus inébranlable, la personne de ceux qui gouvernent plus assurée' (*Lois*, v, 11). The *comparative* construction is important. It shows awareness of the fact that conditions change, and that the law must in course of time change too. Nevertheless monarchy, provided conditions are such that government can be exercised without lapsing into chaos or despotism, is the best way of assuring both stability in the state and ordered change in response to changed conditions.

In a monarchy, laws are fixed and known. The monarch governs according to the law. The intermediary powers, which exercise a real though subordinate jurisdiction, must include a body charged with the 'dépôt des lois'. Montesquieu sees this body not as belonging to the hereditary nobility, too ignorant, careless and disdainful of civil law to exercise this function properly, and not as belonging to the sovereign's own Council which is too much under his immediate sway and too liable to be changed at his will to be competent to act for the public good: 'Ce dépôt ne peut être que dans les corps politiques, qui annoncent les lois lorsqu'elles sont faites, et les rappellent lorsqu'on les oublie' (*Lois*, II, 4). Though it is easy to see that Montesquieu's theory relates to the model of the French *parlements*, he certainly means to apply it to monarchies in general. He does not deny the ultimate authority of the king (it would in any case have been dangerous to do so openly), but he stresses the advantages of having within the constitution a body other than the sovereign monarch whose function it is to say what the law actually is. Affairs of state can be carried out more expeditiously in a monarchy than in a republic since only one person is responsible for initiating and directing them, but if they are conducted according to due process of law, hasty and unconsidered actions are avoided. Montesquieu values highly the delaying powers which were the only direct means possessed by the *parlements* of his time to influence legislation: 'Les corps qui ont le dépôt des lois n'obéissent jamais mieux que quand ils vont à pas tardifs, et qu'ils apportent dans les affaires du prince, cette réflexion qu'on ne peut guère attendre du défaut de lumières de la cour sur les lois de l'Etat, ni de la précipitation de ses conseils' (*Lois*, v, 10).

The other important advantages which he finds in a monarchy as compared with a despotism are also associated with the intermediary powers. Apart from the 'corps politiques' charged with the 'dépôt des lois', he sees a particular need, vital to the nature of monarchy, for the nobility: 'Le pouvoir intermédiaire subordonné le plus naturel est celui de la noblesse. Elle entre en quelque façon dans l'essence de la monarchie, dont la maxime fondamentale est: point de

[4] *Lois*, VIII, 17, my italics

monarque, point de noblesse; point de noblesse, point de monarque. Mais on a un despote' (*Lois*, II, 4).

Why does he so stress the need for a nobility, even emphasising that it should be hereditary 'non pas pour être le terme entre le pouvoir du prince et la faiblesse du peuple, mais le lien de tous les deux' (*Lois*, V, 9)? He sees no necessary association between nobility of rank and personal goodness. On the contrary, his indictment of courtiers is strongly worded and strongly felt: (*Lois*, III, 5).

> L'ambition dans l'oisiveté, la bassesse dans l'orgueil, le désir de s'enrichir sans travail, l'aversion pour la vérité, la flatterie, la trahison, la perfidie, l'abandon de tous ses engagements, le mépris du devoir du citoyen, la crainte de la vertu du prince, l'espérance de ses faiblesses, et plus que tout cela, le ridicule perpétuel jeté sur la vertu, forment, je crois, le caractère du plus grand nombre des courtisans, marqué dans tous les lieux et dans tous les temps.

He in fact puts the question of unselfish merit on one side, arguing that in a monarchy, its lack will be compensated by the desire for 'honneur'. Provided only that the laws are good, individual distinction will be achieved by doing what is in the interest of the public good. This argument however applies to all citizens in a monarchy, and Montesquieu's case is not that the principle of 'honneur' requires a nobility, but that the nobility, who are essential to a monarchy, are inspired by the principle of 'honneur' to act usefully. The real argument for a nobility is rooted in the theory that the king must work through recognised channels if despotism is to be avoided. For the legislative function in a developed society, the 'corps politiques' are the channels of authority, For the executive functions other bodies are needed, and the most natural and permanent of these is a hereditary nobility. He therefore defends the prerogatives of the nobility and of other intermediate bodies also: 'Abolissez dans une monarchie les prérogatives des seigneurs, du clergé, de la noblesse et des villes: vous aurez bientôt un Etat populaire, ou bien un Etat despotique' (*Lois*, II, 4). The existence of a number of such bodies not only acts as a check on despotic power and corruption, but affords the possibility of consultation, of finding an agreed course of action (*Lois*, V, 11):

> Dans les monarchies, les choses sont très rarement portées à l'excès [...] les gens qui ont de la sagesse et de l'autorité s'entremettent; on prend des tempéraments, on s'arrange, on se corrige; les lois reprennent leur vigueur et se font écouter.
>
> Ainsi toutes nos histoires sont-elles pleines de guerres civiles sans révolutions; celle des Etats despotiques sont pleines de révolutions sans guerres civiles.

To Hobbes, who saw England torn apart by civil war, this was the ultimate disaster, and the state existed to suppress it. To Montesquieu, writing long after the last major civil upheavals in France, the Fronde of 1648-53, it was possible to consider these struggles dispassionately. He saw the clash of powers within the state, even if this occasionally resulted in civil war, as necessary to the self-correction of a monarchy. He returns to this idea in considering the civil laws each type of government will produce. In a monarchy there are probably many distinctions of rank, people are jealous of their honour, judges are prone to make fine distinctions, for historical reasons there may be variations in law in different parts of the kingdom: 'le monarque, qui connaît chacune de ses provinces, peut

établir diverses lois ou souffrir différentes coutumes' (*Lois*, VI, 2). He contrasts this flexibility with the rigidity of a despotism. It may lead to abuses such as inconsistent or contradictory judgements but 'c'est un mal nécessaire, que le législateur corrige de temps en temps, comme contraire même à l'esprit des gouvernements modérés' (*Lois*, VI, 2).

No state, however, is eternal and there is nothing automatic about the self-correcting processes of a monarchy. The great danger is that it will turn into a despotism. Montesquieu mentions the other possibility, that a monarchy will turn into a republic or 'état populaire'. Unless it is a small state, he does not think that a republic could survive but, if it does, there is no particular harm – one moderate government has been exchanged for another. Despotism is the danger to be dreaded. He writes of the moderate states of Europe, monarchies and republics, as an oasis in which it is still possible to lead a good, a really human life, while all around there is a desert of tyranny and savagery. He solemnly warns his readers of the possibility that even this oasis may vanish, either as a result of internal mismanagement or because of conquest from outside (*Lois*, VIII, 8).

> La plupart des peuples d'Europe sont encore gouvernés par les mœurs. Mais si par un long abus du pouvoir, si par une grande conquête, le despotisme s'établissait à un certain point, il n'y aura pas de mœurs ni de climat qui tînssent; et, dans cette belle partie du monde, la nature humaine souffrirait, au moins pour un temps, les insultes qu'on lui fait dans les trois autres.

The foregoing is only an outline, though not, I hope, seriously distorted, of Montesquieu's theory of governments. This theory is the foundation of *De l'esprit des lois*, and the author returns to it constantly as he considers in turn the laws which are appropriate to the citizens of each type of state in the various aspects of their lives. His ideas have been much debated by different critics and, while this is not the place for a full discussion of the various analyses, it will be helpful to consider briefly how Montesquieu formed the theory to which he attached so much importance.

Of course, the terms he uses to characterise the different kinds of government were not new. Political philosophers since Aristotle had recognised the classification of states in terms of their method of sovereignty and had distinguished between those ruled by all the citizens, those ruled by a class or section of citizens, and those ruled by one person. Aristotle himself considered that within each of these types there could be a good and an evil form, as, for example, monarchy or tyranny, in the case of states ruled by one person, depending on whether the ruler governed justly in accordance with laws or unjustly in accordance only with his personal wishes (*Politics*, III, 6). Political philosophy had developed in many ways since Aristotle. In Western Europe one powerful development was the theory of the Church as a society superior to all secular states, and of the Pope as superior to all monarchs, an arbiter between them and a court of appeal against them. However, by Montesquieu's time this unified view of the organisation of society had crumbled, and his own work does not seem to have been influenced by it. Moreover, Montesquieu does not follow theologians such as Bossuet and Fénelon in stressing the importance of religion

as the only legitimate restraint on the actions of the king. He certainly intends to speak to men of all nations and to stress the value of checks on the sovereign power, but he speaks as a layman, and the checks he advocates are institutional, not personal to the conscience of the king.

In *De l'esprit des lois*, Montesquieu scarcely mentions the work of other philosophers, except occasionally to indicate a disagreement, as in the case of Hobbes's theory that men are naturally at war with each other (*Lois*, I, 2) and Bayle's argument that true Christians would be incapable of creating a state which would endure (*Lois*, XXIV, 6). All the same, there are many points of resemblance between Montesquieu's exposition and those of other philosophers, It has been shown, for example, that though he does not mention Locke in the *Lois*, he took over a number of Locke's ideas.[5]

Montesquieu's originality consists mainly in the fact that he bases his theory not on abstract reasoning, but on observation of how states work in reality – observation based partly on direct experience, partly on contemporary accounts in journals and books and from the people he met and with whom he corresponded, and partly on all sorts of histories, chronicles, legal texts, romances, poems, and so on, relating chiefly, though not exclusively, to the ancient world and to France. It has been pointed out convincingly[6] that, though he speaks of 'republics', 'monarchies' and 'despotisms', he does not set out to construct an abstract model of each type of state, but is in fact describing the city republics of the ancient world (with an occasional reference to the few city states of modern Europe), the monarchic states of the Western Europe which he knew, and the Turkish, Persian and other Asian empires as he believed them to be from the accounts given by travellers.

The particular classification of states which he adopts, and his identification of the spirit appropriate to each type, become easier to understand when we appreciate that his method was scientific rather than academic, based on reality as he saw it rather than on abstract theory. He describes both democracy and aristocracy as forms of the republic, because both forms existed at different times and places in the city states he had studied. He applies the term 'monarchy' to a state ruled by one person, provided that the rule is tempered by established laws and by the existence of real, even if subordinate, constitutional powers, because that was the form of development followed by the Western European monarchic states which he knew, and which he considered to be fundamentally good types of state so long as they retained this organisation. He concludes, partly no doubt from his knowledge of human nature, but also from the accounts of historians and travellers, that when one man rules, without the checks of laws and established institutions, he will rule despotically and indeed, as we have seen, he thought that most states in his own time, outside Western Europe, were despotisms.

When he comes to describe the spirit and the conditions appropriate to each

[5] G. Davy, 'Montesquieu et la science politique', *IIe centenaire de l'Esprit des lois* (Bordeaux 1949), pp.137-41.

[6] See, for example, E. Durkheim, *Quid Secundatus politicae scientiae instituendae contulerit* (Bordeaux 1892), ch.3. Translated as 'La contribution de Montesquieu à la science sociale' in *Montesquieu et Rousseau, précurseurs de la sociologie* (Paris 1953), pp.253-58.

type of state, he again describes what he believes to be the reality. The city republics functioned well only so long as the ruling citizens (either the whole body or those who formed the ruling class) were able to put the good of their fellow citizens as a whole before the advancement of any individual person. The term 'vertu' seems quite appropriate to such unselfishness. Montesquieu observed that this spirit was unlikely to flourish except in states small enough for the citizens to identify easily with one another, and in which the opportunities for individuals to become wealthy and superior were limited.[7] He appreciated the worth of this type of society, but also the ease with which it could be overthrown, and he considered that a stronger, but still desirable, form of state had evolved in the Western European monarchies which he knew. It was no doubt his stay in England and his study of the English constitution which led him to clarify and explain precisely his celebrated doctrine of the separation of powers as essential to the freedom of the citizen. However, his own life and career in France, his researches into French history and his observations in other parts of Europe had also convinced him that the dispersal of power in some form, which was a characteristic of the Western European monarchies, was essential to a state of moderate size if its citizens were to live in tolerable liberty and prosperity. He also concluded from his obervations that the citizens of these monarchic states were not, and could not be, motivated in their daily lives by a spirit of unselfish service to their fellow citizens as a whole – society was too diverse and too dispersed for that to be possible. Instead, he identified the spirit of these states as 'honneur'. Personal honour was indeed the cause for which Western European men were willing to make sacrifices and even to give their lives. Montesquieu's conception of honour is of a very practical quality; he equates it with the wish to maintain and improve one's standing in the world. This interpretation, not quite in accordance with our present notion of the meaning of honour, is recognisable in the context of the middle and modern ages of Western Europe up to the seventeenth and eighteenth centuries. For example, in Corneille's *Le Cid*, the whole dramatic action is set in train by the furious reaction of Don Gomès, father of Chimène, to the fact that the king has passed him over, in favour of Don Dièguе, father of Rodrigue, for the important post of tutor to the king's son. After Don Gomès has struck Don Dièguе and has been urged to make recompense, he says (Act 1, scene 2):

> J'ai le cœur au-dessus des plus fières disgraces;
> Et l'on peut me réduire à vivre sans bonheur,
> Mais non pas me résoudre à vivre sans honneur.

Montesquieu was original in considering this wish for 'honneur' as not only the prerogative of the privileged classes but the motive force of the type of society

[7] Boris Mirkine-Gutzévitch considers how Montesquieu's description of political virtue might be applied in the twentieth century: 'Deux siècles après, cette vertu a-t-elle changé de sens? La vertu démocratique (et non pas la vertu du comportement individuel) conserve toute sa portée dans les républiques modernes. La vertu de Montesquieu, c'est la recherche des éthiques politiques: ce que Montesquieu, dans sa belle langue surannée, appelait *vertu* nous le dénommerions aujourd'hui: éthique, idéologie, engagement' ('De l'esprit des lois à la démocratie moderne', *Bicentenaire de l'Esprit des lois*, Paris 1952, p.23).

which he knew best, the limited or constitutional monarchic states of Western Europe. His interpretation is striking and useful for an understanding of the subject.

When he comes to despotism, Montesquieu necessarily relies less on observation, direct or indirect, and more on deduction. He states the extreme case – an empire so big that it can only be ruled by force – and has no difficulty in deducing that fear is the motive force or spirit which keeps the state in being. Here too, however, he could claim some direct experience for, in so far as the monarchy in France tended to become more absolute, it took on the character of a despotism. When for example, the king enforced new laws against the remonstrances of the *parlements*, the motive for obedience, at least on the part of the *parlementaires*, was more likely to be fear of the consequences of disobedience than a conviction that their own honour was involved.

After he has established his classification, Montesquieu proceeds to fill out the picture with an account of the laws appropriate to each type of state. Here again, he speaks very much from observation, direct and indirect. As Georges Davy says, we must not be misled by the insistent 'il faut' into thinking that Montesquieu arrived at the systems of law proposed in *De l'esprit des lois* by a process of pure logic:

> Ne soyons pas dupes de l'expression: 'il faut', si souvent employée. S'il faut dans la monarchie des corps intermédiaires, s'il faut un dépôt des lois, une balance et une séparation des pouvoirs, c'est que le système s'est révélé dans l'expérience comme comprenant normalement de telles parties. Et aussi bien cette monarchie si chère à Montesquieu, et dont la nature est qu'un seul gouverne mais par des lois fixes et établies et suivant des équilibres balancés, on croira peut-être qu'elle ne saurait, répondant si bien au tempérament et aux préférences de l'auteur, être autre chose qu'une notion de cabinet, amoureusement ciselée par le désir dans la pure matière logique. Or, bien loin de là [...] 'ce beau système a été trouvé dans les bois' lisons-nous au chapitre 6 du célèbre livre xi, où se trouve décrite la constitution anglaise.[8]

It is no doubt because Montesquieu observed and recorded his observations over such a wide field that his theory of governments continues to be of interest long after the régime under which he lived has perished. As we shall see in the next chapter, Auguste Comte and Emile Durkheim claimed him as a precursor of sociology. Louis Althusser has given a Marxist interpretation.[9] In the Western democracies which are the successors to the monarchic states he described, much of what he advocated – constitutionalism, a balance of powers within the state, racial and religious tolerance, respect for individual liberties and differing traditions – has become commonly accepted, and political arguments are often more about ways of achieving these ends than about the ends themselves. As Henry Puget says: 'Les notions que Montesquieu a propagées sont incorporées maintenant de manière très générale dans le droit public, dans la science politique; elles nous semblent à présent vérités presque banales. N'oublions pas pourtant de les faire remonter jusqu'à lui.'[10]

[8] 'Montesquieu et la science politique', p.168.

[9] *Montesquieu, la politique et l'histoire* (Paris 1954).

[10] 'De l'apport de *L'Esprit des lois* à la science politique et au droit public', *Bicentenaire de l'Esprit des lois*, p.30.

Montesquieu spent twenty years in the preparation of the *Lois*. It was however in 1746 that he finally undertook the revision and preparation of his work for publication. The views he expresses are those of his maturity, and they have an inner coherence: 'Quand j'ai découvert mes principes, tout ce que je cherchais est venu à moi; et, dans le cours de vingt années, j'ai vu mon ouvrage commencer, croître, s'avancer et finir'.[11] So far as the government of states is concerned, his firm conclusion is that a moderate government is infinitely preferable to a despotism and that a monarchy is the only type of moderate government which can survive in a country larger than a city state. Throughout his work he draws on his legal and historical studies to illustrate his theories. The three books on French historical development need to be read in this context.

Before looking at these books, it is interesting to see how consistently in the earlier books Montesquieu develops his theory of governments in the various aspects of the relationships between men in society which he examines. A few illustrations must suffice.

In Book IX he is discussing the ways in which states should defend themselves, and the laws appropriate to each type of society in this connection. He discusses the allegation that a great prince (this was Louis XIV) was aiming at a universal monarchy (in Europe). Montesquieu would naturally not be in favour of such a project, since it would be bound in his view to result in a state too big to be administered as a monarchy, and the result would be either chaos or despotism. He comments in chapter 7: 'S'il y avait réussi, rien n'aurait été plus fatal à l'Europe, à ses anciens sujets, à lui, à sa famille. Le ciel, qui connaît les vrais avantages, l'a mieux servi par ses défaites qu'il n'aurait fait par des victoires.'

In Book XI he is discussing political liberty in relation to different constitutions. In discussing what constitutes political liberty, Montesquieu draws the classic conclusion that in a state, that is in a society governed by laws, liberty is the ability to do what one ought to want to do and not be obliged to do what one ought not to want to do. But he does not believe in a God-given Platonic type ruler whose mission it is to frame laws and make people do what is right. There is no easy or certain way to achieve good government and he stresses the tendency of everyone who holds power to abuse it – hence the need for a check on every power: 'La vertu même a besoin de limites. Pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir' (*Lois*, XI, 4).

In the same book, the analysis of the English constitution is deservedly famous. In the course of this, he distinguishes three powers which must exist in any type of state: 'la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil' (*Lois*, XI, 6). He further defines these as: 1. the power to make laws; 2. the power to conduct foreign policy, wage war, secure the safety of the state from invasion; 3. the power of administering justice, i.e. punishing crimes and deciding on differences between citizens. He says that if these three powers are united in one person, political liberty cannot exist. The English constitution provides for their separation in such a way as to conduce to extreme

[11] *Lois*, Montesquieu's Preface.

political liberty, but Montesquieu does not think that a constitution on the English model is necessarily the best for all moderate states, only that the powers must be divided in some way if the state is not to lapse into despotism. In speaking of 'les monarchies que nous connaissons,' he says: 'les trois pouvoirs n'y sont pas distribués et fondus sur le modèle de la constitution dont nous avons parlé. Ils ont chacun une distribution particulière, selon laquelle ils approchent plus ou moins de la liberté politique et, s'il n'en approchaient pas, la monarchie dégénérerait en despotisme' (*Lois*, XI, 7).

He traces back to the Germanic invasions the origin of monarchical government on the European model. It was a long process which eventually achieved an excellent type of state. But, like all things human, states change and he speaks of the best period for Europe as something already in the past. He summarises the process thus: Each German tribe (he calls them nations) used to assemble to decide matters of state. When this became impossible as they spread out in conquest, they chose representatives to assemble. At first only the aristocracy and the monarch took part and 'le bas peuple' were in subjection: 'C'était un bon gouvernement qui avait en soi la capacité de devenir meilleur.' Then came the custom of enfranchisement 'et bientôt la liberté civile du peuple, les prérogatives de la noblesse et du clergé, la puissance des rois, se trouvèrent dans un tel concert, que je ne crois pas qu'il y ait eu sur la terre de gouvernement si bien tempéré que le fut celui de chaque partie de l'Europe dans le temps qu'il y subsista' (*Lois*, XI, 8).

The observation that what he calls moderate governments exist practically nowhere except in a part of Europe leads Montesquieu to consider the influences which incline men either towards moderate governments, or else towards despotism and slavery. He examines the influences of climate, of physical geography, of religion. The subject matter is vast, far beyond the compass of one man or one work. He undoubtedly achieves his purpose of making his readers think for themselves. It is important to realise that though he sets out to explain, he does not excuse nor regard as inevitable the evil conditions in which so many people live, the cruelty they suffer. This applies most certainly to the discussion in Book XV about the laws of civil slavery, particularly to Chapter 5 on negro slavery which is an example of his most brilliant and mordant style. It applies also to Books XXIV and XXV concerning the relationships of religion and law. On the question of toleration he says that the fundamental principle is 'Quand on est maître de recevoir dans un Etat une nouvelle religion ou de ne la pas recevoir, il ne faut pas l'y établir [this is because of the danger to civil peace]; quand elle y est établie, il faut la tolérer' (*Lois*, XXV, 10). The grave remonstrance addressed to the inquisitors of Spain and Portugal deserves to take its place with the condemnation of negro slavery. He ends with these words: 'Si quelqu'un dans la postérité ose jamais dire que dans le siècle où nous vivons, les peuples d'Europe étaient policés [i.e. civilised], on vous citera pour prouver qu'ils étaient barbares; et l'idée qu'on aura de vous sera telle, qu'elle flétrira votre siècle, et portera la haine sur tous vos contemporains' (*Lois*, XXV, 13).

As one reads the *Lois*, a picture builds up of the kind of state which Montesquieu believes is conducive to a truly human life. There is no slavery. People are on the whole united in their religious beliefs but there is no persecution.

There is a sense of security deriving from the fact that the laws are known and cannot be either changed or implemented arbitrarily. The laws themselves are accepted as wise in general and it is possible to change them, with due care and consultation, to fit changed circumstances. Agriculture and commerce flourish, population increases and, given the sufficiency of material goods, the state helps as necessary the poor, the unfortunate, the young, the sick, the old. The civilised state 'donne aux uns les travaux dont ils sont capables; il équipe les autres à travailler, ce qui fait déjà un travail [...] [il] doit à tous les citoyens une subsistance assurée, la nourriture, un vêtement convenable et un genre de vie qui ne soit pas contraire à la santé' (*Lois*, XXIII, 29).

A question which perceptive readers of *De l'esprit des lois* must have put to themselves in 1748 and the succeeding years in which the work reached a very wide audience, and which we ask ourselves today, is whether Montesquieu thought that the spirit of the laws of France, and the way in which the spirit was actually interpreted in his society, were producing what he thought of as a good state. A second question, which his readers since the Revolution must consider, is whether that great event was foreshadowed in his work. For, in fact, 1789 was only forty-one years after 1748, and we can see now that the ancien régime was already under serious strain when Montesquieu was writing.

In this present study, I do not propose to enter on that vast field of research, the causes of the French Revolution, which has already been explored by so many experts. At this point, however, I want to step back to Montesquieu's own period and to consider what estimate he formed of the society in which he lived and the direction it was taking.

It seems clear that Montesquieu did in fact think that the spirit of the laws of his own country corresponded, at least to a large extent, with his idea of a good state. He saw the apparatus of privilege, though subject to abuses, like everything connected with human nature, as a necessary barrier against despotic power. He went further, he thought the French, faults and all, a happy nation, 'vive, agréable, enjouée, quelquefois imprudente, souvent indiscrète et avec cela du courage, de la genérosité, de la franchise, un certain point d'honneur'. He even feared that unwelcome changes might be imposed, in an effort to make people more serious and responsible and that these would be ineffective because they would be against the natural bent of his countrymen (*Lois*, XIX, 5):

> C'est au législateur à suivre l'esprit de la nation, lorsqu'il n'est pas contraire aux principes du gouvernement; car nous ne faisons rien de mieux que ce que nous faisons librement, et en suivant notre génie naturel.
> Qu'on donne un esprit de pédanterie à une nation naturellement gaie, l'Etat n'y gagnera rien, ni pour le dedans ni pour le dehors. Laissez-lui faire les choses frivoles sérieusement, et gaiement les choses sérieuses.

This particular passage was probably composed, according to dr Shackleton's study of the manuscript of the *Lois* in the Bibliothèque nationale, at some time between 1743 and 1746. The economic situation of France was weakened by her involvement in the first of the three wars – the war of the Austrian succession, the Seven Years War and the war of American Independence – in which France and England confronted each other, but there was little reason to doubt that the return of peace would bring prosperity as it had done before, and as indeed

it did again. It would have been impossible for Montesquieu, or anyone else, to foresee in any detail the complex interaction of economic, social and intellectual malaise which preceded the Revolution. Among the many relevant studies, perhaps the most significant in this context are *Les Origines intellectuelles de la Révolution française*, by Daniel Mornet,[12] and *La Crise de l'économie française à la fin de l'ancien régime et au début de la Révolution*, by C. E. Labrousse (Paris 1944). Robert Mandrou, in his book in the *Clio* series, *La France aux XVII et XVIII siècles*,[13] gives a useful general survey. There is an illuminating summary in a passage from the section entitled 'La "Crise de l'économie française" dans les années 1770-1790' (p.130):

> Les vingt années qui précèdent immédiatement la Révolution sont placées sous le signe d'un ralentissement de la prospérité, dont les effets psychologiques ont été au moins aussi importants que les mécomptes financiers ou économiques proprement dits. Après un demi-siècle (ou presque) de croissance ininterrompue, une série d'accidents météorologiques a fait réapparaître des difficultés saisonnières qui n'ont jamais présenté la gravité des véritables crises d'autrefois. Mais elles ont été supportées d'autant plus mal que la période ininterrompue de bonnes années avait été plus longue. Pendant les quinze ans du règne de Louis XVI, toutes les formes de calamités agricoles se sont succédées: récoltes céréalières insuffisantes, mauvaises années viticoles, épizooties et sécheresses inouïes, jusqu'aux très mauvaises années 1788 et 1789.
>
> A aucun moment, et pour aucune région, il n'est possible de parler de famine et de 'mortalité'. Pourtant le ralentissement des affaires, tout comme la disparition du surplus paysan négociable, ont été ressentis comme des catastrophes. Ils ont rendu plus sensibles que jamais les tensions qu'impliquaient les rapports sociaux. Les charges seigneuriales et royales apparaissent aux paysans plus lourdes, jusqu'à l'insupportable, au moment où les rentiers du sol, irrités par le recul de leurs revenus, s'efforcent de restaurer tous les titres, même les plus désuets. La réaction seigneuriale du règne de Louis XVI apparaît ainsi – après tant d'années de prospérité – bien plus odieuse que ne l'avait semblé celle du XVIIe siècle. La 'question féodale' devient la préoccupation majeure de la paysannerie; de la même façon que la fiscalité royale prend dans les milieux urbains une dimension nouvelle à travers ce relatif marasme, et entraîne des impatiences non moins grandes, exprimées par des troubles graves pendant tout le règne.

All this was in the future when *De l'esprit des lois* was composed. Nevertheless, though Montesquieu could not foresee the events of 1789 and succeeding years, if we consider *De l'esprit des lois* in the context of its own time and of his other work, it is legitimate to conclude that the coming of a Revolution would not have surprised him. He believed that the size, position and history of France were such as to require a moderate form of government, that such a government was in accordance with the spirit of the nation. The government of France in his time was a monarchy and, according to his theory, if this was to be exercised moderately, effective intermediate powers between the king and the people were absolutely necessary. But he knew, and was well aware that many of his readers also knew, that for some centuries past the French monarchy had become more and more powerful in relation to all other institutions in the realm. During the civil wars of the Fronde the nobility had tried ineffectively to regain some of

[12] Second edition (Paris 1934).

[13] Paris 1967. See also a recent survey in English by William Doyle, *Origins of the French Revolution* (Oxford 1980).

their former position in the state, and a further short-lived, ineffectual, attempt to associate the nobility with the government had been made by the Regent in 1715-1718. Only one kind of organisation remained, the *parlements*, which shared the legislative and judicial functions of the monarch in any recognised way. The reality, as opposed to the theory, was that these worked more or less effectively as law courts, though their efficiency was impaired by the chaotic state of the civil law, but such political power as they managed to exercise was completely negative. Alfred Cobban describes it thus:

> Registration by the *parlements* was the normal method of promulgating royal decrees. They could protest against these by *remontrances* which, intended for the King's eye alone, in the eighteenth century were often published by the *parlements* for the purpose of stirring up public opinion. If the *parlements* refused to register a decree, the King could enforce registration by the formal procedure of *lit de justice*. Finally, in the event of continued resistance he could exile individual magistrates or the whole court to some other part of France. The *parlements*, for their part, could reply by suspending their sessions, thus holding up the course of justice, causing great inconvenience, and arousing public opinion in their favour.[14]

In the *Lettres persanes*, published in 1721, Montesquieu who was already a magistrate of some years' standing had expressed, through the mouth of Usbek his opinion of the *parlements*:

> Les parlements ressemblent à ces ruines que l'on foule aux pieds, mais qui rappellent toujours l'idée de quelque temple fameux par l'ancienne religion des peuples. Ils ne se mêlent guère plus que de rendre justice, et leur autorité est toujours languissante [...] Ces grands corps ont suivi le destin des choses humaines: ils ont cédé au temps, qui détruit tout, à la corruption des mœurs, qui a tout affaibli, à l'autorité suprême, qui a tout abattu.[15]

Such open comment on the existing régime is not repeated in the *Lois* but the constitutional message is nonetheless present and powerful. In Books XXVIII, XXX and XXXI, which we shall look at in more detail, he studies the evolution of civil and constitutional law in France. The very last book is concerned with the 'révolutions' which had occurred in the balance between the king and other powers in the state from the Barbarian invasions to the beginning of the Capetian dynasty. The unstated conclusion, which it is left to the reader to draw, is surely that, unless France is to degenerate into despotism, contrary to the spirit of its laws, the balance between king and other powers in the state, must be restored. Another turn of the wheel, another 'révolution' would be needed. No doubt he would have advocated peaceful and gradual reform if he could have spoken openly, but the absolute monarchy had grown too rigid for that to be permissible. Another forty years, renewed wars, renewed financial and economic crises and continued opposition by the *parlements* and the nobles (growing ever more united) to the reforms needed by the king's government, all these, and the example of the American Revolution, were required before the pressure for constitutional change built up to such an extent, that the desperate expedient of summoning

[14] A. Cobban, *A history of modern France* (Harmondsworth 1968; orig. ed. London 1957), i.37.

[15] *L.P.* 92, Nagel iC.184; Pléiade i.268.

the States General in 1789, for the first time for 175 years, led directly to the violent and overwhelming Revolution of 1793-94 in France. Whether Montesquieu's own theories had some influence on the course of events leading up to the Revolution is a question we shall consider in Chapter 10. Here, it seems legitimate to say that if he could have applied his theories to that event and to the later history of France he might with consistency have argued, within the meaning of his own terms, that after a period of partial anarchy and partial despotism the spirit of moderate government once more regained its power.

2. The spirit and history of the laws in France

I HAVE not attempted within the limits of this study to evaluate in depth Montesquieu's account of the development of French civil and constitutional law, but I have added notes, based on modern authorities, where it seems that these may be helpful to an understanding of the matter. There are, of course, a great many specialist and general works of reference available. I have, however, relied for the most part on the following works:

1. I have used two specialist studies of the history of French law. The first is: Emile Chénon, *Histoire générale du droit français* (Paris 1926-1929). This is a very detailed study, with many references to source material, and is, I think, the best general work of its kind. It is in two volumes:

i: Gallo-Roman period (50 B.C. to A.D. 476)
Frankish period (fifth to tenth centuries)
Feudal and customary law period (tenth to sixteenth centuries)

ii: Feudal and customary law period (continued)
Monarchic period (sixteenth century to 1789)

For each period, the law is considered under general headings, including the sources of law (codes, enactments, etc.), public (or constitutional) law and private (or civil) law, and under several subdivisions of these headings. There are also chapters on the transitions between the periods. The second volume was published posthumously and does not include the section, no doubt intended by Chénon, on *droit privé*.

The second specialist study is: Henri Regnault, *Manuel d'histoire du droit français* (Paris 1940). This is a much shorter study, intended for the use of university students, and omits references to source material. It is in three parts:

1. From Gaul to France
2. The Feudal World
3. Monarchic period

The *Manuel* is a useful and very readable work of reference, and also, something more. The author explains that he wishes to interest his readers in the process by which French law has developed (avant-propos, p.viii):

> On s'est attaché à montrer que, dans le domaine juridique, rien ne naît spontanément, que les institutions ont des précédents et tendent sans arrêt vers la formation d'institutions nouvelles; qu'ainsi le droit public français n'est pas né un jour déterminé; que le législateur n'est pas le maître de la règle juridique, parce que, ainsi qu'on l'a finement remarqué, le futur n'est pas le résultat d'un coup de dé ou d'une volonté arbitraire, mais représente d'une manière exacte ce qui doit être obligatoirement en fonction du passé.

This is an approach close to that followed by Montesquieu.

2. For a general history of the Merovingian and Carolingian periods, I have taken the standard work by Ferdinand Lot, *Naissance de la France* (Paris 1970). This is an edition, revised by Jacques Boussard, of a work first published in 1948. An extensive and up-to-date bibliography is included.

3. For general studies of the feudal system, I have used:

Marc Bloch, *La Société féodale*, 2 vols. (Paris 1939-40). Many later editions of this excellent work have been published.

R. Fawtier, 'L'Europe occidentale de 1270-1328', in Glotz, *Histoire du Moyen Age*, vi (Paris 1940).

F. L. Ganshof, *Qu'est-ce que la féodalité?* (Brussels 1968). This is the fourth edition, revised by the author, of a work first published in 1944.

4. Finally, I have used the valuable and detailed notes by Jean Brethe de La Gressaye to Books XXVIII, XXX and XXXI of *De l'esprit des lois*, in tome iv of his critical edition of the text (Paris 1961). Robert Derathé, in his later edition of *De l'esprit des lois* (Paris 1973), is content for the most part to refer readers to m. de La Gressaye's notes, which in turn are frequently based on the works by Chénon, Lot and Ganshof already mentioned.

This seems the right place to say that, in my judgement, Montesquieu's historical account stands up well in the light of modern knowledge. His account is comparatively short, but his statements on most of the points he regarded as important in connection with his theory about the spirit of the laws of France are supported in the works to which I have referred. The organisation of early German society, the facts of the Frankish invasion of Gaul and the establishment of a Frankish monarchy by Clovis, the co-existence thereafter, at various levels of society, of different peoples and different systems of law, the gradual fusion which took place, the existence in the realm of powers other than the king, the weakening of the Merovingian line which led to its replacement by the Carolingians, the gradual establishment of hereditary offices and hereditary land-holdings, the strong growth of the feudal system (in which royal courts of justice were almost displaced by seigneurial courts), the consequent weakness of the Carolingians and their replacement by the Capetians, the disappearance of the old codes of law, the growth of customary law, the gradual re-emergence of Roman law in a different form and the codification of customary law – all these stages in Montesquieu's outline of development may be found in the pages of Chénon, Lot and other modern historians. Within this general framework, however, there are some matters about which Montesquieu may well be mistaken. Only two of these would seem to be on matters of importance to his theory of development. One is the question as to whether people were free, in Merovinginan and Carolingian times, to choose under which law they would live; this is discussed below, pp.153-57. The other is the question as to whether, from Merovingian times onwards, the administration of justice was ordinarily attached to the grant of land; this is discussed below, pp.30-31

Montesquieu interpreted the historical events he describes in a particular way. The reader must judge for himself to what extent that interpretation of the spirit of the laws of France was valid in his own time, and whether it can still contribute to our understanding of the subject.

The three historical books XXVIII, XXX and XXXI of *De l'esprit des lois* should, as explained in the previous chapter, be read in the context of the theory of governments expounded in the earlier part of the work. They illustrate particularly well Montesquieu's method of working, for they show how knowledge of the laws, customs and history of France influenced his thought, and they also show him demonstrating, to his own satisfaction at any rate, that 'tout se plie

à mes principes'. In order to understand the relevance of these books to his work, it may be helpful to consider briefly the nature of Montesquieu's method in *De l'esprit des lois*. Many useful studies, putting forward various points of view, have been published.[1] Here I propose to follow the approach which seems to me the most valid and fruitful.

Montesquieu was influenced by the work of others. Among modern philosophers, Descartes, Spinoza, Hobbes, Grotius are perhaps only the most famous of those whose work he knew, for he was very widely read. Yet he consciously set out, not to elaborate on previous work, but to do something quite new. If he could have met his future critics, he would probably have agreed with Auguste Comte and Emile Durkheim when they claimed him as the originator of that new science of society to which Comte gave the name of sociology.[2] By this they meant that Montesquieu was the first whose intention it was to examine objectively 'cette infinie diversité de lois et de mœurs' found in human societies, to argue that '[les hommes] ne sont pas uniquement conduits par leurs fantaisies', and to see, and attempt to show his readers 'chaque loi particulière liée avec une autre loi, ou dépendre d'une plus générale' (*Lois*, Author's preface). It is hardly surprising that both Comte and Durkheim agree that, considering the state of knowledge at the time when Montesquieu wrote, he could not do more than point the way to the new science of societies. Nevertheless Comte speaks (p.85) of the 'éminente supériorité' of Montesquieu 'sur tous les philosophes contemporains'. This is despite the fact that, in connection with Montesquieu's supporting evidence, Comte also comments: 'la stérile accumulation de ces faits [politiques], indifféremment empruntés, souvent sans aucune critique vraiment philosophique, aux états de civilisation les plus opposés paraît directement repousser toute idée d'un véritable enchaînement scientifique' (p.86). Durkheim thinks that, on the contrary, Montesquieu's examples are relevant to the subjects he is discussing – commerce, religion, the family, etc. – and also to the nature of the different societies he is examining. Durkheim, speaking, it must be remembered, as a sociologist, summarises his own principal objections to Montesquieu's method as follows: 'Elles [les lois] n'expriment pas, selon lui, comment la nature de la société engendre les institutions sociales, mais ce que sont les institutions

[1] For example: G. Lanson, 'L'Influence de la philosophie cartésienne sur la littérature française', *Revue de métaphysique et de morale* (1896), reprinted in his *Etudes d'histoire littéraire* (Paris 1929); C. Oudin, *Le Spinozisme de Montesquieu* (Paris 1911); J. Brethe de La Gressaye, tome I of *De l'esprit des lois* (Paris 1950), Introduction pp.XCII-CX; C. J. Beyer, 'Montesquieu et l'esprit cartésien', *Actes du congrès Montesquieu* (Bordeaux 1956), pp.159-73; I. Berlin, 'Montesquieu', *Proceedings of the British Academy* XII (London 1956), reprinted in *Against the current* (London 1979), pp.130-61; R. Shackleton, *Montesquieu, a critical biography* (Oxford 1961), in particular pp.244-64.

[2] A. Comte, 47e leçon (composed 1839) in *Cours de philosophie positive*, new edition (Paris 1975), ii, 80-99.

E. Durkheim, *Quid Secundatus politicae scientiae instituendae contulerit* (Bordeaux 1892). Translated as 'La contribution de Montesquieu à la constitution de la science sociale' in *Montesquieu et Rousseau, précurseurs de la sociologie* (Paris 1953), pp.25-113.

G. Davy, 'Montesquieu et la science politique' in *II^e Centenaire de l'Esprit des lois* (Bordeaux 1949); extracts reprinted as an introduction to E. Durkheim, *Montesquieu et Rousseau* (see above), pp.9-23. Quotation reference is to this work.

qu'exige cette nature de la société, comme si leur cause efficiente devait être cherchée dans la seule volonté du législateur' (p.112). Georges Davy makes an interesting effort to refute this criticism. He points out that Montesquieu says in his preface to the *Lois*: 'J'ai bien des fois commencé et bien des fois abandonné cet ouvrage [...] Je suivais mon objet sans former de dessein. Je ne trouvais la vérité que pour la perdre: mais quand j'ai découvert mes principes tout ce que je cherchais est venu à moi; et dans le cours de vingt années, j'ai vu mon ouvrage commencer, croître, s'avancer et finir.' For Davy these words are an exact description of the best experimental method. He suggests that the order of exposition in the *Lois*, which so frequently takes the form of a statement of principle followed by examples, does not reflect the actual process of research: 'Si les principes ont été posés d'abord pour rendre l'exposition plus claire et rigoureuse, ils ne l'ont été qu'après avoir été laborieusement découverte dans l'expérience' (p.22). This appears to be a valid comment so far as it goes, although the evidence which satisfied Montesquieu might very well be found wanting in the light of later research. A related problem which has troubled the critics, including Durkheim, is the extent to which Montesquieu was a determinist. Here the truth seems to be that, although he set out to discover and describe the ways in which the laws and customs of various societies are linked with each other and with the society as a whole, he nevertheless attributed to men some power, however circumscribed, of autonomous action. His own words in the first chapter of the *Lois* correctly express his philosophy:

> L'homme, comme être physique, est, ainsi que les autres corps, gouverné par des lois invariables. Comme être intelligent, il viole sans cesse les lois que Dieu a établies, et change celles qu'il établit lui-même. Il faut qu'il se conduise; et cependant il est un être borné; il est sujet à l'ignorance et à l'erreur, comme toutes les intelligences finies; les faibles connaissances qu'il a, il les perd encore: comme créature sensible, il devient sujet à mille passions. Un tel être pouvait, à tous les instants, oublier son créateur; Dieu l'a rappelé à lui par les lois de la religion. Un tel être pouvait à tous les instants, s'oublier lui-même; les philosophes l'ont averti par les lois de la morale. Fait pour vivre dans la société, il y pouvait oublier les autres; les législateurs l'ont rendu à ses devoirs par les lois politiques et civiles.

In other words, as Durkheim rightly recognises, Montesquieu is neither a determinist nor a believer in the absolute power of free will. The whole tenor of the argument in the *Lois* shows that he thought that individuals, and in particular the legislator or sovereign, were able to act wisely or foolishly, strongly or weakly, even to the extent, in an extreme case, of bringing about a change in the nature of the society (e.g. *Lois*, VIII, 7). The fact that men frequently do not understand what the results of their actions will be, and that they have to take account of existing circumstances, does not mean that they are not free, only that they ought to act with great circumspection.

The three historical books, which we will now examine, trace the evolution of civil and constitutional law in France. This evolution is shown, not as a necessary development of the society concerned, but as a very complex process in which, at different times, many different people took the initiative. As we shall see, the French state, during the period Montesquieu examines, had what he regards as the good fortune, partly through force of circumstances and partly

because of legislative action, to retain a moderate type of government and to be ruled by law or custom, not by the will of despots.

It will be helpful for the reader to know how Montesquieu distinguished the various periods to which he refers. He uses the conventional terms. Gaul under the Roman Empire is called 'les Gaules' and becomes France at the period of the Frankish conquest. The 'première race' or Merovingian dynasty runs from Clovis I, 481-511 to Childeric III, 743-757. The title of king passed into the family of the real rulers of France, the *maires du palais*, when Pepin III was recognised as king by the Assembly of Soissons in 751 and subsequently consecrated by the pope in 754. The family of Pepin is the 'deuxième race', known as the Carolingian dynasty from its greatest member, Charlemagne, who succeeded Pepin as king of the Franks in 768 and became Roman Emperor in 800. The Carolingians continued with some interruptions as emperors and/or kings of France until Louis V, 986-987. The election of Hugues Capet as king in 987 was the beginning of the 'troisième race', the Capetian dynasty, whose eight hundred years as the ruling family were drawing to a close at the time when Montesquieu wrote.

Turning first to Book XXVIII: *De l'origine et des révolutions des lois civiles chez les Français*, the picture that emerges is of a country in which the growth of civil law had been a long, slow natural process. No unified system had ever been imposed on the country, applicable to all people and in all places. Various kings took the lead, gave an example in the domain for which they were directly responsible, but never had the right, nor usually the power, to enforce their will over the whole country. From the time of the German invasions, powers other than those of the king had always existed. Changes in the codes of law and the customs, the tendency towards more uniformity in the country as a whole, came about by the consent of the different powers, as a reasonable response to changed circumstances. The development of civil law in France is therefore consistent with Montesquieu's view of the processes appropriate to a moderate type of state. There had been times when the king's authority was so weak and the power of the *seigneurs* so great in relation to him, that France was rather a series of little states than one single state, but there had never been a time when the king ruled alone and could exercise his will arbitrarily. The spirit of the civil laws of France was that of a monarchy, not of a despotism.

The writing of the historical books is so densely packed with references and examples, that it may be helpful to draw out the thread of the argument as set out in the three books.

In Book XXVIII Montesquieu considers the civil laws of France from the time when the Roman empire in Europe, governed by laws prescribed from Rome, was invaded by the Barbarian tribes or nations. Each nation brought its own personal law with it, but did not impose this on the conquered inhabitants of 'les Gaules'. Consequently, 'Le pays qu'on appelle aujourd'hui la France fut governé, dans la premiere race, par la loi romaine ou le code Théodosien, et par les diverses lois des barbares qui y habitaient' (ch.2). These different codes of law were written down at an early date and so conserved.

According to Montesquieu, it was a characteristic of the Barbarian laws that

people could choose under which law they wished to live.[3] This characteristic influenced the way in which Roman law was gradually assimilated to Barbarian law or vice versa. In the kingdom of the Franks, the Barbarian law gave advantages to those who accepted that law over those who did not and gradually the Gallo-Romans came to choose the code of the Franks. In other places, this was not the case, there was no motive for the Gallo-Romans to change, and eventually the invaders came to accept the local Roman code. These changes took place by personal choice, not as a result of decrees by the rulers. However, as time went on, and the great majority of the inhabitants of a particular region accepted one law, that law took on the character of a territorial law, applicable to all the inhabitants of the region. He cites the Edict of Pistes promulgated in 864 by Charles the Bald, which distinguishes between the 'pays' governed by Roman law and those which were not (ch.6).

The codes of law disappeared as such during the 9th and 10th centuries. They had not remained unchanged up to then. Capitularies had been added to them. These had been promulgated by the kings after deliberations in the assemblies of the nation, which in those days was represented by *Seigneurs* and bishops: 'il n'était point encore question des communes' (ch.9). Montesquieu attributes the disappearance of the codes largely to the fact that the feudal system having become general and hereditary, and the monarch's authority weak, it was the *seigneurs* and not the king who administered the law: 'il n'y eut plus de loi commune parce que personne ne pouvait faire observer la loi commune' (ch.9). Capitularies ceased to be issued and customs which differed from place to place grew up, though the spirit of the ancient codes lingered on: 'l'on suivit l'esprit de la loi, sans suivre la loi même' (ch.9). The clergy very largely separated themselves from the lay administration of law, and followed the canons of Church Councils and decrees of the Pope. Furthermore, after the reign of Charlemagne, the country was ravaged by the Norman invasions and by internal strife. In France, as in Germany, the arts of reading and writing were almost lost and the written codes and capitularies were forgottten: 'Ainsi, comme dans l'établissement de la monarchie on avait passé des usages des Germains à des lois écrites, on revint, quelques siècles après, des lois écrites à des usages non écrits' (ch.3).

For the whole period from the Barbarian invasions up to and including the time when feudal administration covered the whole of France, there were accepted ways of deciding disputes between individuals and the guilt or innocence of people accused of crimes. There was evidence given on solemn oath and borne out by supporters (the number varying according to the importance of the affair); there was trial by ordeal (boiling water, hot iron), and trial by combat. Cruel and irrational as these trials may seem to us, says Montesquieu, they were at least a method of keeping the peace and avoiding the private vengeance which would otherwise have resulted in continual petty warfare. They were not as shocking to a hardy and warlike people as to modern Europeans. In the context and outlook of the times, they were 'plus déraisonnables que tyranniques' (ch.18).

[3] See chapter 10 below, pp.153-57.

The solemn oath fell into disuse as it was realised that false witness was too easily given and procured. Trial by ordeal also fell into disuse. Trial by combat became the sole judicial method of settling disputes: 'Toutes les actions civiles et criminelles se réduirent en faits. C'est sur ces faits que l'on combattait [...] tout fut gouverné par le point d'honneur. Si l'on n'avait pas obéi au juge, il poursuivait son offense' (ch.19).[4]

Montesquieu says that a considerable jurisprudence grew up around the 'combat judiciaire', tending to make it less unreasonable in practice than in principle: 'les hommes, dans le fond raisonnables, mettent sous des règles leurs préjugés mêmes' (ch.23). He elaborates on this jurisprudence, including the question of appeals, in chapters 23 to 28.

One great turning point occurred in the reign of Saint Louis. He abolished the 'combat judiciaire' as a method of proof in his own domain. (Montesquieu says this was decreed in 1260, but 1257 is now considered the probable date.) He replaced the combat by an enquiry which called on the testimony of witnesses. He also abolished the 'combat judiciaire' for appeals, and the method he substituted was calculated to ensure that judges took great care in their decisions. In the case of appeals, the judges were summoned by the appellant and the superior court of the king; then if the first judgement was not upheld, it was not reversed but the judges had to pay damages to the appellants. Montesquieu correctly insists on the fact that the king, Saint Louis, could legislate for these reforms only in the royal domain, where the seigneurs were directly subject to him. The great fiefs or baronies (Normandy, Brittany, Aquitaine, Flanders, Champagne, Toulouse) were like sovereign states even though they acknowledged the suzerainty of the king and formed part of the kingdom of France. Therefore the king could not legislate for them, he could only proceed with the consent of the barons. Nevertheless legal practices were gradually reformed in the baronies also. Montesquieu asks us to make the effort of imagination required to return to those times and to realise that the king could and did do a great deal by education and example outside his own domain. He refers to the 'Etablissements de Saint Louis' and comments:

[4] Compare Bloch, *La Société féodale*, ii.i.140-41: 'On ne concevait pas à cette époque [about the middle of the thirteenth century], qu'un procès, une fois tranché, pût recommencer, entre les mêmes adversaires, devant d'autres magistrats. En d'autres termes, l'erreur proprement dite, honnêtement commise, ne semblait pas susceptible de redressement. Un des plaideurs, par contre, estimait-il que le tribunal avait volontairement mal jugé? ou bien lui reprochait-il d'avoir, plus brutalement encore, refusé tout jugement? Rien n'empêchait qu'il n'en poursuivit les membres devant une autorité supérieure. Si, dans cette action absolument distincte de la précédente, il obtenait gain de cause, les mauvais juges, généralement, subissaient un châtiment et leur sentence, de toute façon, était réformée. L'appel ainsi entendu – nous le nommerions aujourd'hui prise à partie du juge – existait dès le temps des royaumes barbares. Mais il ne pouvait être porté, alors, que devant la seule juridiction qui s'élevât au-dessus des plaids des hommes libres: à savoir la cour royale. C'est dire que la pratique était rare et difficile. Le régime vassalique ouvrit des possibilités nouvelles. Tout vassal, désormais, avait son seigneur de fief pour juge ordinaire. Or le déni de justice était un crime, comme les autres. On lui appliqua donc, tout naturellement, la règle commune et les appels montèrent ainsi, d'échelon en échelon, le long de la filière des hommages.'

Ainsi le prince remplit son objet [...] il ôta le mal en faisant sentir le meilleur. Quand on vit dans ses tribunaux, quand on vit dans ceux des seigneurs [i.e. the seigneurs of his own domain] une manière de procéder plus naturelle, plus raisonnable, plus conforme à la morale, à la religion, à la tranquillité publique, à la sûreté des personnes et des biens, on la prit, et on abandonna l'autre. Inviter, quand il ne faut pas contraindre, conduire, quand il ne faut pas commander, c'est l'habileté suprême. La raison a un empire naturel; elle a même un empire tyrannique: on lui résiste, mais cette résistance est son triomphe; encore un peu de temps, et l'on sera forcé de revenir à elle.[5]

The thirteenth century was a watershed in French civil law. The procedure gradually changed in many ways. Cases were tried in secret instead of openly. The facility with which appeals could be made meant that great legal expenses might be incurred and it became the rule that the losing party should be responsible for paying them – so as to hinder frivolous appeals. The state or 'partie publique' took over the prosecution in cases of crime. The way was opened for laws which were generally recognised and tribunals with a general authority. The functions of the *parlement* were extended. This body, originally part of the *conseil du roi*, had specialised in appeals in cases involving the king or members of the nobility or higher clergy. Now it became a general court of appeal, and sat permanently in Paris. The press of business became such that provincial *parlements* were set up also, and these acted as final courts of appeal for their own areas.[6]

There had also developed a system of ecclesiastical courts alongside the seigneurial courts. In the confused times when feudal power was at its height and every great or little *seigneur* administered justice in his own way, the lay and the ecclesiastical jurisdiction often overlapped. Montesquieu says that the 'juridiction ecclésiastique' helped to weaken the 'juridiction des seigneurs' and so strengthen the power of the 'juridiction royale', and then in turn 'la juridiction royale restreignit peu à peu la juridiction ecclésiastique, et celle-ci recula devant la première' (ch.41).

Meanwhile, as another strand in the development of French civil law, the influence of Roman law began to increase. Montesquieu refers to the discovery of Justinian's code in 1137 (*Lois*, XXVIII, 42) – this is a legend, but it is true that at the end of the eleventh century and during the twelfth century Roman law, which had been to a large extent lost and forgotten, was taught at the universities

[5] *Lois*, XXVIII, 38. Montesquieu's discussion of the *Etablissements* is complex. As we shall see later, he rightly recognised, in advance of his time, that the code known as the *Etablissements de Saint Louis*, is a private *coutumier*, but he is inclined to attribute greater influence to it than to other *coutumiers* of the same period, because it applied in the king's domain. The decision on the 'combat judiciaire' pre-dated the publication of the *Etablissements* by some fifteen years.

[6] Fawtier, in 'L'Europe occidentale de 1270 à 1328', emphasises the very gradual process of establishing royal authority and the limits to this process. He says (p.166): 'il y a donc dans le royaume, outre la justice royale, bien des justices particulières de qui relèvent un grand nombre de sujets. Peu à peu cependant la justice royale fait sentir son action; sa procédure a une tendance à prévaloir. Le Parlement, par ses interventions constantes et généralement équitables, contribue à ce progrès. Mais la législation présente un obstacle que la royauté ne réussira pas à surmonter. Pas de justice unique sans une loi unique. Or la loi, en France, est multiple.'

of Bologna and Montpellier, and then at other universities, so that knowledge of it became widespread. The upshot was that those parts of France in which, centuries before, Roman law had established itself as territorial law, and where there was a predisposition in its favour, again adopted it as the basis of their civil law. In those parts of France where the Barbarian codes had established themselves as territorial law customary law continued, but it was much influenced by Roman law.[7]

From these developments, and from the revival of learning generally, grew the need for properly trained legal specialists. The seigneurial courts were not able to cope with the new demands. Montesquieu says: 'le combat judiciaire demandait, dans ceux qui jugeaient, très peu de suffisance; on décidait les affaires, dans chaque lieu, en suivant quelques coutumes simples, qui se recevaient par tradition [...] tout ceci ne demandait aucunes lettres, aucune capacité, aucune étude' (ch.42). People were sometimes judged by their peers; in other places the *bailli*, or *seigneur*'s officer, was advised by the local elders (*prud'hommes* or *vieilllards*). These good people could not cope with proper legal procedures, nor were such procedures attractive to the *seigneurs* as the 'combat d'honneur' had been. Gradually the *bailli* became a specialist as a judge in the seigneurial courts. The fact that he judged alone is recognised by Montesquieu as an abuse, but he stresses that ways had been found to remedy this – it is an abuse 'qui n'a lieu que dans les justices locales [et] a été moderé, et en quelque façon corrigé, par l'introduction en plusieurs lieux d'un lieutenant de juge, que celui-ci consulte, et qui représente les anciens prud'hommes; par l'obligation où est le juge de prendre deux gradués dans les cas qui peuvent mériter une peine afflictive; et enfin il est devenu nul par l'extrême facilité des appels' (ch.42).

He stresses that these changes did not come about suddenly; he suggests in chapter 43 that it was not a case of a new system, but of natural growth: 'tout cela se fit peu à peu et par la force de la chose'. He continues in the same chapter: 'il ne faut pas croire que les droits dont les seigneurs jouissaient autrefois, et dont ils ne jouissent plus aujourd'hui, leur aient été ôtés comme des usurpations: plusieurs de ces droits ont été perdus par négligence, et d'autres ont été abandonnés parce que divers changements s'étant introduits dans le cours de plusieurs siècles, ils ne pouvaient subsister avec le changement.'

At the end of Book XXVIII another important agent of change is mentioned – the introduction of written records. As education spread, the practice grew of accepting written testimony. Then regulations were made to ensure such testimony was available: e.g. registers of birth, death and marriage, receipts for debts and so on. The serfs were enfranchised and written charters were drawn up of the rights given to the *seigneurs* in exchange for the property they had held in the serfs. Individual kings and *seigneurs* issued charters setting out the law on their own domain. Finally came 'la grande époque', when Charles VII and his

[7] Compare Chénon, *Histoire du droit français* i,197-200, pp.502-513. He discusses the changes in Roman law over the centuries, how it affected and was affected by customary law. He says that, by the end of the sixteenth century 'le droit de Justinien a triomphé à peu près complètement dans les pays de droit écrit, où, sauf de rares exceptions (Toulouse, Bordeaux, etc), il n'est plus question de Coutumes. A cette date, on peut dire que "droit écrit" est devenu entièrement synonyme de "droit romain".'

successors ordained that throughout the kingdom written records should be drawn up, in a prescribed form, showing the local customs. These records were deposited with the provincial assemblies, there was opportunity for comparison, and many of the formulas became general throughout the provinces: 'Ainsi nos coutumes prirent trois caractères; elles furent écrites, elles furent plus générales, elles reçurent le sceau de l'autorité royale' (ch.45).[8]

Here Montesquieu leaves the subject with just a reference to the fact that the process continued, with changes constantly made to fit changed circumstances, and that he could have gone on to show 'tous les changements insensibles qui, depuis l'ouverture des appels, ont formé le grand corps de notre jurisprudence française' (ch.45).

In Book XXVIII Montesquieu outlines the development of civil law in France; in Book XXX he outlines the development of political law, that is, the way in which the organisation of the state itself had grown. To understand the argument, it is necessary to go back to Book XI *Des lois qui forment la liberté politique dans son rapport avec la constitution.* In chapter 4, Montesquieu says: 'pour qu'on ne puisse abuser du pouvoir, il faut que, par la disposition des choses, le pouvoir arrête le pouvoir'. As we have seen, in chapter 6 he defines the three sorts of 'pouvoirs' which exist in a state and it is worthwhile studying once more his definition: 'Il y a dans chaque Etat trois sortes de pouvoirs: la puissance législative, la puissance exécutrice des choses qui dépendent du droit des gens, et la puissance exécutrice de celles qui dépendent du droit civil.'

His view of the nature of 'la puissance législative' in French society had emerged in Book XXVIII. History show that this was not an arbitrary power exercised despotically. The French lived according to a variety of legal codes and customs, written and unwritten, which had developed into the complex jurisprudence of his own time. In Book XXX he studies the development of 'la puissance exécutrice', the power of the state to defend itself from foreign attack and to prevent civil crimes and quarrels. As in his study of French civil law, he goes back to the time of the German invasions and his object is to show that the feudal organisation, in which power was divided between the king and the *seigneurs*, was a natural development from the organisation of early German society imported into France. The book is entitled *Théorie des lois féodales chez les Francs dans le rapport qu'elles ont avec l'établissement de la monarchie.* It is not a full history of the feudal régime but a theory or thesis supported by considerable documentation. The theory is that it was of the nature of the French state, from the German invasions up to and including the full development of the feudal system, that the executive power was never exercised by the king alone throughout the land, but was shared between the king and various intermediate powers.

[8] See Chénon, *Histoire du droit francais*, ii, 397-99, pp.292-300 for an account of the 'rédaction et réformation officielles des coutumes'. Chénon summarises the results of this process (pp.298-300): the customs ceased to be uncertain because they were written down; they ceased to be subject to continual variation because the king's authority gave them the force of law; they became less diverse, especially at the second stage when an effort was made to reduce the number of customs and to reconcile their provisions – 'les réformations diminuèrent la diversité des Coutumes, et contribuèrent ainsi à la formation d'un certain droit coutumier'.

Montesquieu finds the germ of the feudal system in the organisation of early German society as described by Caesar and Tacitus. The German tribes were not organised as despotisms nor as republics. There was a prince and he was surrounded by chosen companions. The Germans were warrior peoples, hunters and fighters, not cultivators of the earth. The chosen companions led others to the hunt and to war in support of their prince. They distinguished themselves by deeds of courage and service to the prince, and he gave them gifts, both to reward them and to retain their loyalty. In early days, the gifts were simple – horses, weapons and so on – drawn from the booty taken. Montesquieu does not trace in detail the crucial change from this type of gift to the giving of land. The nearest he comes to an explanation is in Chapter 9. He speaks there of the law of the Burgundians and the Visigoths about division of lands between them and the Gallo-Romans and he says: 'Ces partages ne furent point faits dans un esprit tyrannique, mais dans l'idée de subvenir aux besoins mutuels des deux peuples qui devaient habiter le même pays.' From that point to the full development of the feudal system is a long way and he stresses that it took many centuries to develop. Nevertheless, through all the changes that took place, the basic organisation persisted:

> J'ai parlé de ces volontaires qui, chez les Germains, suivaient les princes dans leurs entreprises. Le même usage se conserva après la conquête. Tacite les désigne par le nom de compagnons, la loi salique par celui d'hommes qui sont sous la foi du roi, les formules de Marculfe par celui d'antrustions du roi, les premiers historiens par celui de leudes, de fidèles, et les suivants par celui de vassaux et de seigneurs [...] Les biens réservés pour les leudes furent appelés des biens fiscaux, des bénefices, des honneurs, des fiefs, dans les divers auteurs et dans les divers temps.[9]

From the beginning the *seigneurs* (to take the name which had descended to Montesquieu's own time) were distinguished by the power which they shared with the king, to lead others to war. They therefore shared 'la puissance exécutrice du droit des gens'. He argues that they also shared 'la puissance de juger'. He says: 'C'était un principe fondamental de la monarchie que ceux qui étaient sous la puissance militaire de quelqu'un étaient aussi sous sa juridiction civile' (ch.18). Military power and the civil jurisdiction connected with it spread slowly. In the course of centuries, as civil strife continued, more and more fiefs were granted as rewards and inducements, and the feudal system eventually established itself so strongly in France that freemen gave up their freedom for the protection of living under a *seigneur*. He adds to the evidence that diffused power was characteristic of the monarchy by showing how seigneurial jurisdiction was associated with financial arrangements. His line of reasoning is curious but cogent. In early German society, imported into France after the invasion, administration of justice consisted not so much in punishing the wrongdoer

[9] Compare Ganshof, *Qu'est-ce-que la féodalité?*, p.15 (part I, single chapter): 'Les origines des institutions féodo-vassaliques doivent être cherchées dans la monarchie franque à l'époque mérovingienne et tout particulièrement dans les pays d'entre Loire et Rhin qui en ont constitué le cœur.' Nevertheless, as Jean Brethe de La Gressaye points out (*Lois*, iv.365), Montesquieu brings together in this passage the institutions of several different stages of the feudal system, as if they were all the same institution: 'il a négligé de faire l'historique de la vassalité'.

(except for the capital crimes of treachery and cowardice) as in protecting him from private vengeance and in forcing the person offended to abandon revenge and to accept from the offender the fine prescribed by law. For this service the offender paid his protector a fee or 'fredum', Montesquieu argues that the king, in granting fiefs, gave the *seigneurs* complete financial jurisdiction over them: 'Ceux qui les obtinrent eurent à cet égard la jouissance la plus étendue; ils en tirèrent tous les fruits et tous les émoluments' (ch.20). The 'freda' or profits of justice formed a large part of these emoluments and were paid to the *seigneurs*. He sees the whole feudal system – military, judicial, fiscal – as a coherent whole and a natural development of early German social organisation. The *seigneurs* did not usurp sovereign rights but shared them. This is not to say that he thought the system should have remained unchanged or that rights the *seigneurs* had lost should be restored to them. He is aware that the organisation of a state must adapt to changed circumstances. His concern is to show that historically the spirit of the French state was a spirit of political liberty – not despotism but power sharing.[10] The rights and wrongs of the process by which the *seigneurs* acquired so much power are still debated by modern historians. What seems clear is that, over a period of many centuries from the establishment of the Frankish monarchy, offices and landholdings became hereditary, charters of immunity from the royal administration were granted to many ecclesiastic or municipal bodies, and the system by which men 'recommended' themselves to the protection of an overlord became very widespread. The cumulative effect was to remove power from the monarchy and to disperse it among individuals and corporate bodies. Montesquieu was right to deny the term 'usurpation' to this long, slow change of function. There is some room for doubt, however, concerning his argument that the right to administer justice was strictly attached to territorial rights. Ganshof, in *Qu'est-ce que la féodalité?* (part 3, ch.4, p.142), considers that the two rights were distinct even though they often coincided in the same person. Regnault, too, in chapter 5 of his *Manuel d'histoire du droit français*, says that the axiom 'Fief et justice, c'est tout un' seems to have been not the statement of a universal principle, but merely the description of the usual state of affairs. Evidently, Montesquieu does not fully describe the complexities of the French feudal system. It seems that sometimes the right to administer justice was devolved from king to *seigneur* with the grant of land and sometimes separately from the grant of land. The fact that the right was devolved does not seem to be in doubt.

In the course of the book he refutes two rival theories about the history of the French monarchy and it is interesting to note that he thought that both theories, though opposed to each other, would if they were true imply that the king was a despot.

The first theory, put forward by its best known protagonist, the comte de Boulainvilliers, in his *Histoire de l'ancien gouvernement de la France*,[11] was simply

[10] See chapter 10 below for a fuller account of Montesquieu's view of the development of the French constitution and comparisons with the views of other historians of about the same period.

[11] La Haye, Amsterdam 1727.

that *seigneurs* were descended from the conquering Germans and serfs from the conquered Gallo-Romans. Montesquieu produces considerable documentary evidence that this was not the case and that, on the contrary, after the first violence was over, the invaders and the surviving Gallo-Romans lived alongside one another, each with their own codes of law. Boulainvilliers assumed that the Germans established fiefs and serfs belonging to those fiefs throughout the land. Montesquieu argues that, on the contrary, the feudal system took centuries to establish itself all over France, and that it was the result not so much of the first invasions as of the continuous civil strife which followed. He proceeds to argue that, as the documents show clearly that fiefs were not hereditary in the early days of the monarchy, Boulainvilliers's theory would mean that the king at the time of the invasion was able to dispose at his will of all the land and all the people on it – in fact he would have been a despot. The argument against Boulainvilliers may be expressed thus: Boulainvilliers's account is not borne out by the documents and, if events had taken place as he supposed, the inference to be drawn from them would not be that early French society was composed of noble families, with the king at their head, ruling a lesser people, but that it was a society where the king was a despot and all the rest in bondage to him, even though he favoured some more than others: 'Comme celui qui a les biens a toujours aussi la puissance, le roi qui aurait disposé continuellement des fiefs, c'est à dire de l'unique propriété, aurait eu une puissance aussi arbitraire que celui du Sultan l'est en Turquie; ce qui renverse toute l'histoire' (ch.5).

Montesquieu does not think very highly of Boulainvilliers as a scholar: 'il avait plus d'esprit que de lumières, plus de lumières que de savoir' (ch.10). Nor is he much impressed by the work of the abbé Dubos, chief protagonist of a rival theory about the French monarchy. Dubos set out his theory in what Montesquieu calls 'les trois mortels volumes' of *L'Histoire critique de l'établissement de la monarchie française dans les Gaules* (Amsterdam 1734). He argued that the origin of the power, the legitimacy, of the Frankish monarchy did not lie in the fact of successful invasion, but derived from an invitation from the Gallo-Romans to the Frankish king Clovis to rule them and from concession of authority by the Roman emperor to Clovis. Dubos argued that in the French state which succeeded the Roman empire in Gaul, there was only one order of citizens under the king and that the *seigneurs* subsequently usurped powers and privileges which rightfully belonged to the monarch. If this had been the case, the French king would of course originally have been a despot, according to Montesquieu's definition of the term, in that he exercised absolute authority unchecked by other powers. Montesquieu alleges, with a wealth of documentation, that Dubos's theories are simply not supported by the facts. There is no evidence worth the name that Clovis was invited to become king, or that he merely succeeded to the position of the Roman emperor in Gaul.

On the evidence available at the time, Montesquieu certainly seems to have the better of the argument, though later historians, not suprisingly, differ from him on certain important points. This matter will be considered more fully in the last chapter (see below, pp.158-65). The interpretation of the nature or spirit of the French state as that of a monarchy limited by the existence of intermediate powers is cogent and consistent. One feels that Montesquieu does, within the

limits of a short study, substantiate the claim made in Chapter 2 of Book XXX to have found the key to understanding the nature of the feudal system: 'Que si, dans la recherche des lois féodales, je me vois dans un labyrinthe obscur, plein de routes et de détours, je crois que je tiens le bout du fil, et que je puis marcher'.

In Book XXXI he continues to explain his theory of feudal laws, this time in their relationship to the 'revolutions' or changes in the monarchy. By 'monarchy' he means not only the ruler himself or the ruling family, but the monarchic state, that is, the political organisation of France.

In his analysis of this book, Jean Brethe de La Gressaye summarises excellently the various themes, but some of his assertions are open to question. He suggests that Montesquieu, viewing events now as a historian rather than as a philosopher, sees that the feudal régime weakened the authority of the state and that while the nobility remains essential, as a subordinate power, to the monarchy and tempers the authority of the king, it can no longer be a body of great vassals with whom the king shares both the land and the sovereign power. He sees this book as 'un correctif que le réalisme de l'historien apporte au livre précédent où le théoricien de la monarchie française soutenait que le régime féodal, d'origine germanique, est un élément essentiel et naturel du gouvernement de la France'.[12]

This explanation of Book XXXI does not really do justice to the complexity of Montesquieu's argument and thereby to some extent falsifies his meaning. He certainly shows that the feudal system as it developed in France was a sign and a result of weakness in the nominal sovereign, but his argument is much more wide-reaching than this. His design is to show that the spririt of the French state tended towards the preservation of a balance between the power of the king and the power of the 'nation'. During the period he is discussing, the 'nation' is represented by 'les grands', that is the nobility and, from an early period after the German invasions of France, the higher clergy also. He identifies certain turning points – 'révolutions' – in the relationship between the king and 'les grands', within the context of the development of the feudal system up to the time when the holder of the greatest fief became king himself. These turning points are marked by new institutions which restore the balance of power and prevent the monarchy from declining permanently into a state of despotism or anarchy.

The first turning point is associated with the 'supplice de Brunehault' followed by the edict of Clotaire II in 614. In the centuries preceding these events, the power and postion of 'les grands' had gradually become more firmly established. At first the great offices of state were not granted for life, still less in perpetuity to a particular family, and though there are records of gifts of land outright 'en pleine propriété', at a very early date, the most usual arrangement was for those who were given land to become vassals of the king, holding their land in fief, a state which carried many advantages, but not that of security of possession. There is however a natural tendency for those who have to hold.

Montesquieu says 'd'abord les comtes [officers responsible for raising troops

[12] *Lois*, Book XXXI, analyse, p.233.

for the king] n'étaient envoyés dans leurs districts que pour un an; bientôt ils achetèrent la continuation de leurs offices' (ch.1).

According to the law, gifts of land in fief could be transferred but this was not done arbitrarily: 'c'était ordinairement une des principales choses qui se traitaient dans les assembléees de la nation' (ch.1). However he thinks, though he does not cite proof, that the holders of fiefs often got round the law: 'on peut bien penser que la corruption se glissa dans ce point, comme elle s'était glissée dans l'autre; et que l'on continua la possession des fiefs pour de l'argent, comme on continuait la possession des comtés' (ch.1). The queen-regent Brunehault attempted to take back the fiefs. If the public good had been the object of the 'révocation des dons' all might have been well. But the fiefs were reclaimed in order to be redistributed at the whim of the queen: 'Brunehault, par un esprit corrompu, voulut corriger les abus de la corruption ancienne. Ses caprices n'étaient point ceux d'un esprit faible: les leudes et les grands officiers se crurent perdus; ils la perdirent' (ch1.). The outcome was that 'les grands' conspired to overthrow her, she was put death and Clotaire II who became the reigning monarch was obliged to make a number of very far-reaching concessions. Still in the first chapter of Book XXXI Montesquieu explains that Warnachaire, the *maire du palais* of Burgundy, who had led the conspiracy against Brunehault was confirmed in his office for life by Clotaire, 'et cette autorité commença à se rendre indépendante de l'autorité royale'. In this and the following chapter he analyses the edict of Pistes given at the Council of Paris in 615, designed to limit the powers of the king and correct abuses in the laws. The nobility were strengthened by the confirmation or restoration of gifts made by Clotaire's predecessors, Church property was restored and the influence of the king in the choice of bishops was weakened, new taxes introduced during the regencies which preceded the reign of Clotaire II were abolished, and important reforms were made in the administration of civil law. These reforms were designed to prevent the exercise of arbitrary power. Montesquieu says: 'Personne ne put plus être condamné sans être entendu; les parents durent toujours succéder selon l'ordre établi par la loi; toutes préceptions [orders made by the king to judges permitting certain things, which were not allowed by law, to be done] pour épouser des filles, des veuves ou des religieuses furent nulles, et on punit sévèrement ceux qui les obtinrent et en firent usage' (ch.2).

This first revolution, then, is characterised by a decisive assertion of rights and powers not subject to the arbitrary decrees of the sovereign. The original laws had proved insufficient. The desire of 'les grands' for security of tenure in their offices and their lands had been too strong for the laws to resist. The sovereigns had used arbitrary power to overrule the laws when it suited them. The time came when it was a question of submitting to despotism or establishing a new balance of power. The nation turned away from despotism and the edict of Pistes established and legalised the new balance of power.

Modern historians agree with Montesquieu's assessment. Ferdinand Lot, for example, writes:

La fin du despotisme est marquée véritablement par l'édit de 614. L'extermination des descendants de Sigebert, l'union en la personne de Clotaire II des trois parties du *Regnum Francorum* séparées depuis 561, la nécessité de mettre fin aux troubles et guerres qui

avaient déchiré l'Eglise et l'Etat au cours de cette longue période, nécessitèrent la réunion d'une double assemblée, ecclésiastique et laïque qui se tint à Paris, en octobre. Le concile ne réunit pas moins de soixante-dix-neuf évêques et fut vraiment un concile des Gaules. Les plaintes et les propositions des évêques touchent, comme il convient, toutes sortes de sujets exclusivement ecclésiastiques, mais qui signalent aussi les violences et les spoliations dont les églises ont été victimes, les griefs de laïques nous sont connus par les dispositions mêmes de l'édit qui ont pour but de les apaiser.

Lot summarises the clauses of the edict and concludes:

Qualifier de charte constitutionnelle ce pêle-mêle de dispositions de tout genre serait s'abuser. Les prérogatives de la royauté n'y sont nullement battues en brèche. Il n'en demeure pas moins que la royauté a pris des engagements envers ses sujets et des engagements qui ne seront pas oubliés [...] L'édit de 614 atteste donc bien que nous sommes à un tournant de l'histoire des Mérovingiens. Désormais ils ne peuvent rien sans le palais et sans son chef, le maire.[13]

The new order was not of course immutable. The balance of power tilted further against the kings, the change gathered momentum and led up to a second 'révolution' or turning point. Montesquieu identifies this as the process by which power passed effectively from a hereditary king to a *maire du palais*, the king's administrator. These *maires* were at first chosen by the king in consultaion with the assembly. In course of time, the kings became mere figureheads and it was the *maires* who were the real rulers of the state.

That the titular king and the person who exercised the real power were not necessarily one and the same was not, in Montesquieu's view, contrary to the spirit of the nation. He returns to the account by Tacitus of German tribal organisation: 'Tacite dit que, dans le choix de leur roi, ils se déterminaient par sa noblesse; et dans le choix de leur chef, par sa vertu. Voilà les rois de la première race, et les maires du palais; les premiers étaient héréditaires, et les seconds étaient électifs' (ch.4). In the early days of the German invasions, the warrior kings united in their own persons the positions of head of state and head of the armed forces (the executive power). The later descendants of Clovis had not the necessary qualities. They made other arrangements for administering the kingdom and providing leadership for the armed forces, as Montesquieu explains (ch.5):

La première fonction des maires du palais fut le gouvernement économique des maisons royales. Ils eurent, concurremment (c) avec d'autres officiers, le gouvernement politique des fiefs; et, à la fin, ils en disposèrent seuls. Ils eurent aussi l'administration des affaires de la guerre et le commandement des armées; et ces deux fonctions se trouvèrent nécessairement liées avec les deux autres. Dans ces temps-là, il était plus difficile d'assembler les armées que de les commander: et quel autre que celui qui disposait des grâces pouvait avoir cette autorité? Dans cette nation indépendante et guerrière, il fallait plutôt inviter que contraindre; il fallait donner ou faire espérer les fiefs qui vaquaient par la mort du possesseur, récompenser sans cesse, faire craindre les préférences: celui qui avait la surintendance de palais devait donc être le général de l'armée.

Note (c); Voy. le second supplément à la loi des Bourguignons, tit.XIII, et Grégoire de Tours, Liv. IX, ch. xxxvi.

The transfer of all effective power from the king to the *maire du palais* did not

[13] *Naissance de la France*, pp.181-83.

come about in one reign or one century. So long as the office of *maire* was not held for life, the *maire* was insecure in relation to the king. So long as the kingdom was divided, as at the time of the edict of Pistes, into three parts, Austrasia, Neustria and Burgundy,[14] each with its own *maire*, but each acknowledging the same king, the *maires* were in a position of inferiority to the king. Montesquieu says: 'les maires avaient été administrateurs du royaume *sous les rois*; et, quoiqu'ils eussent la conduite de la guerre, les rois étaient pourtant à la tête des armées, et le maire et la nation combattaient *sous eux*'.[15] We have seen however, how Warnachaire, *maire* of Burgundy, obtained his office for life. When he died the king Clotaire II reassumed authority over the whole nation with the assent of the assembly. The assembly at first also agreed to the personal rule of Clotaire's son Dagobert but his incompetence led to the division of the kingdom and eventually to the re-establishment of the system of *maires*. In Austrasia the office of *maire*, though elective, became attached to the Pepin family. Pepin I (Pepin of Heristal) conquered Neustria and Burgundy and from that time (around 687) the Pepin family were the real rulers of France and the titular kings were shadows.[16] The *maires* 'les tinrent dans une maison royale, comme dans une espèce de prison. Une fois chaque année ils étaient montrés au peuple. Là, ils faisaient des ordonnances, mais c'étaient celles du maire; ils répondaient aux ambassadeurs, mais c'était la réponse du maire' (ch.6). This then was the culmination of the second revolution. It was accompanied by a weakening of power at the centre, for the elected *maires* were of necessity inclined to favour the *seigneurs* whose support they needed. Montesquieu says in chapter 7 that the great offices of state were more and more granted for life. He quotes no source for this opinion and it appears that the office of count was in fact transferable up to the time of Charlemagne's successors. He is however noting a tendency rather than a definite change in the law. Similarly, in the same chapter, he notes a tendency for fiefs to become hereditary, while in chapter 8 he remarks that still in the time of Charlemagne 'la plupart des bénéfices étaient encore à vie.'

The transfer of power reached its logical fulfilment when the title of king was taken from the last of the Merovingian dynasty, Childeric III and bestowed on Pepin III, grandson of the Pepin who had conquered Neustria and Burgundy and reunited them to Austrasia. Montesquieu insists that this event was not itself a revolution, but merely the result of the revolution which had already taken place, a recognition of reality: 'Quand Hugues Capet fut couronné roi au

[14] The precise boundaries of these territorial divisions were variable. Austrasia included what is now North Eastern France and part of Germany, from the area around Reims to the Rhine; next came Neustria, which comprised roughly the area from the Seine to the Loire and included Paris; in the South East lay Burgundy which extended westwards across the Rhone to take in large parts of Aquitaine.

[15] *Lois*, XXXI, 6, my italics.

[16] Compare Chénon, *Histoire du droit français* i, 95, p.191: Il [the major domus or *maire du palais*] fut non seulement le premier ministre, mais à proprement parler l'unique ministre du roi frank. Aussi ses attributions étaient-elles des plus étendues, pour ne pas pas dire illimitées. Vers 680, le major domus, en Neustrie et en Austrasie, avait réussi à subordonner étroitement à son autorité tous les autres officiers du palais et tous les grands du royaume.

commencement de la troisième race, il y eut un plus grand changement, parce que l'Etat passa de l'anarchie à un gouvernement quelconque; mais, quand Pépin prit la couronne, on passa d'un gouvernement à un autre gouvernement' (ch.16).

The kingship now became both hereditary and elective. The 'assemblée des grands' chose the king, but it was recognised that they chose within the one family. The situation was further confused by the custom of dividing lands between sons on the death of the father. In practice, consequently, the king might choose his successor of successors during his own lifetime, and apply to the *seigneurs* to ratify his choice. However, restricted as the power of the nation may have been, it was a real power – the king could not reign without the consent of the assembly.[17]

We have seen that Montesquieu says that when the kingship passed from the second to the third race, the state passed from anarchy to government of a kind. The next few chapters show how the government of France under the second race degenerated into anarchy. Here we must remember that he is not writing a history of France but putting forward a theory of the feudal system in its relationship to the changes in the monarchy. He is concerned only incidentally with persons but very much with that imbalance within the system which, gathering momentum, made of France under the later Carolingians not a monarchy but a series of large and small states, almost completely independent of the king, and continually at war with him and among themselves.

Pepin was succeeded by Charlemagne who received the title of emperor from the pope. He had indeed inherited in Austrasia, Neustria and Burgundy a kingdom larger than modern France and his conquests took in what is now called Germany and much of Italy. By his personal qualities he held the empire together. Montesquieu pays his tribute to Charlemagne in Chapter 17: 'Charlemagne songea à tenir le pouvoir de la noblesse dans ses limites, et à empêcher l'oppression du clergé et des hommes libres. Il mit un tel tempérament dans les ordres de l'Etat qu'ils furent contrebalancés, et qu'il resta le maître.'

But with Montesquieu's own principles in mind, we are not surprised to find that, failing the prestige and personal qualities of a Charlemagne, the great empire could not be governed effectively as a monarchy. Montesquieu would expect it to decline into despotism or anarchy. 'Les grands' were too powerful for despotism to be possible, and the stage was set for creeping anarchy. The empire itself broke up fairly rapidly. Charlemagne had only one surviving legitimate son, Louis the Pious, and under him the empire continued though it was perishing from within: 'le prince avait l'esprit faible; mais la nation était guerrière. L'autorité se perdait au dedans, sans que la puissance parût diminuer au dehors' (ch.21).

Disaster struck when Louis the Pious was survived by three legitimate sons.

[17] Chénon, *Histoire du droit français* i, 92, pp.183-84, traces the history of elections from the time when Louis the Pious in 817 consulted 'tous les évêques et les grands assemblés' about the division of his empire between his three sons up to the election in 884 of Charles the Fat, who was not the nearest male relation of the previous king. He comments: 'A dater de ce moment, il est inutile d'insister, le caractère électif de la couronne n'est plus contesté par personne.'

A partition of lands had been made between them before Louis died, and one son nominated as emperor with suzerainty over the other two, but it would not do and the brothers fought it out in June 841, the year following the death of their father. To that battle and to the treaties which followed it Montesquieu attributes the irresistible spread of the feudal system in France and the decline of the monarchy into impotence. He concentrates on that part of the empire, corresponding roughly to modern France, which came to Charles the Bald as king.

In chapter 25 he sets out the 'Cause principale de l'affaiblissement de la seconde race. Changement dans les alleux.' At the treaty of Verdun in 843 the grandsons of Charlemagne divided the empire between them. At the treaty of Meersen in 847 they made certain arrangements designed to strengthen themselves against outside enemies and for this purpose they made a number of dispositions in favour of their vassals, 'les grands', whose support they needed. This is the treaty to which Montesquieu refers when he says: 'Quelque temps après cette bataille [Fontenoy], les trois frères, Lothaire, Louis, et Charles, firent un traité dans lequel je trouve des clauses qui durent changer tout l'Etat politique chez les Français' (ch.25).

He identifies particularly the clause which allowed a freeman to choose as *seigneur* whom he wished, either the king or from amongst other *seigneurs*. From this time a man could change his freehold into a fief which he held, not directly from the king but from another *seigneur*. Before this time, though a freeman could recommend himself for a fief (with the consequent obligations on both sides) to a *seigneur*, he was still obliged to provide military service, in respect of his freehold, directly to the king. Montesquieu says that as a result of the treaty of Meersen: 'ceux qui étaient autrefois nuement sous la puissance du roi, devinrent insensiblement vassaux les uns des autres, puisque chaque homme libre pouvait choisir pour seigneur qui il voulait, ou du roi, ou des autres seigneurs' (ch.25).[18]

He explains in chapter 26 another important cause of weakness in the monarchy. Going back to a capitulary of 757 in the time of the first king Pepin (grandfather of Charlemagne), he finds that those to whom the king gave a benefice (or fief) could give a part of the benefice to others who became their vassals, but that when the king took back the benefice, either on the death of the holder or for some other reason, he took the whole of it back. The 'arrière-vassaux' were not protected. The king could then grant the whole benefice to a new holder who was again at liberty to establish new 'arrière-vassaux'. This changed as fiefs became hereditary during the Carolingian epoch: 'Cela changea lorsque les fiefs passèrent aux héritiers, et que les arrière-fiefs y passèrent de

[18] Chénon, *Histoire du droit français* i, 124, pp.292-93: 'En 847 Charles-le-Chauve, par le capitulaire de Mersen, met le dernier complément au système [the system of 'commendatio', by which freemen could choose to recommend themselves to the protection of a *seigneur*] en ordonnant à tout homme libre de se chosir un *senior* dans son royaume, soit lui-même, soit l'un de ses fidèles, et en lui défendant de le quitter sans juste motif. Que l'on donne à ce texte un sens absolu ou un sens relatif, il n'en est pas moins vrai que, s'il eût été suivi à la lettre, il eût fait disparaître la classe des hommes libres, transformés tous en hommes recommandés.'

même. Ce qui relevait du roi immédiatement, n'en releva plus que médiatement; et la puissance royale se trouva, pour ainsi dire, reculée d'un degré, quelquefois de deux, et souvent davantage' (ch.26).

Another change, attributable directly to the treaty between the three brothers, took place to the detriment of the monarchy (ch.27):

> Du temps de Charlemagne on était obligé, sous de grandes peines, de se rendre à la convocation, pour quelque guerre que ce fût; on ne recevait point d'excuses; et le comte qui aurait exempté quelqu'un, aurait été puni lui-même. Mais le traité des trois frères mit là-dessus une restriction, qui tira pour ainsi dire la noblesse de la main du roi: on ne fut plus tenu de suivre la roi à la guerre, que quand cette guerre était défensive.[19]

Montesquieu attributes this clause to the need to placate the nobles, who feared, after the battle of Fontenoy in which 100,000 Franks were killed, that the ambition and rivalry of their kings would lead to the extermination of the race. Nor was this all. Montesquieu says: 'il semblait que tout prît un vice particulier et se corrompît en même temps' (ch.28). He refers to the capitulary of Charles the Bald at Quierzy-sur-Oise in 877 which, he says, established that the offices of the counts should be passed on to their children, and that this should apply to fiefs.[20] Soon the ruling was extended to more distant relations, so that the majority of *seigneurs* who formerly had their titles direct from the crown, now held them only indirectly, and the counts who had formerly represented the king in the courts of justice, and who led the freemen to war for the king, were now interposed between the king and the freemen, 'et la puissance se trouva encore reculé d'un degré' (ch.26).

So he paints a picture of a state which is no longer a state because it has broken into many parts and there is no longer an effective unifying force. The kings, in the constant attempt to buy the loyalty of the *seigneurs* and the clergy lost all but the remnants of their authority and their land. Once offices and land tenure became hereditary they had no means of regaining their power: 'l'arbre étendit trop loin ses branches et la tête sécha' (ch.32). The revolution of the feudal system was complete. But such a divided France was too weak to resist outside attack. The country became a prey to invasion, particularly that of the Normans, and the feudal system, in the last of the 'révolutions' described in the *Lois*, found the means to regain unity. The kingship passed from the Carolingian family to Hugues Capet, the holder of the most powerful fief.

Historians nowadays vary in the significance they attach to the accession of Hugues Capet as an individual event. Chénon, in telling the story (*Histoire du droit français*, i, 184, pp.465-8), points out that Hugues Capet was the third member of his family to be elected king, though there was not an unbroken succession and Carolingians had held the crown in between. He discounts

[19] Lot, *Naissance de la France*, p.355, paraphrases this provision of the treaty of Meersen: 'Les rois consentent à ce que les vassaux des fidèles se rendent à l'armée, sous l'autorité de leur seigneur, mais, en cas d'invasion ennemie, tout le monde doit marcher en masse.'

[20] A note by Jean Brethe de La Gressaye (*Lois*, Book xxxi, note 87) warns that Montesquieu's interpretation, which followed the common opinion of his day, may be too wide since the final decision was still reserved to the king, but says that historians agree that 'ce capitulaire annonce l'hérédité des offices et des fiefs, car le roi était trop faible pour refuser la transmission aux héritiers'.

theories that the last election, which began the official Capetian dynasty, represented the triumph of French nationality over German nationality, the revenge of Neustria over Austrasia or the triumph of 'la féodalité' over 'le principe monarchique'. He thinks that it happened simply because 'les grands' preferred an independent prince to a Carolingian prince who was a vassal of the king of Germany: 'il n'y eut en somme dans l'élection qu'une question de personnes, et non une question de races ou de principes. Aussi, en dépit de certaines assertions, il faut bien conclure qu'il n'y eut en 987 aucune "révolution". Hugues Capet, déjà roi de fait, devint simplement roi de droit.' However, if we look further ahead than Chénon does at this point, we may conclude that Montesquieu had a good case for his proposition that the recognition of a Capetian, lord of a vast territory stretching from Paris to Angers, as the legal as well as the *de facto* king of France, gave back to the monarchy the power base which it had lost under the later Carolingians, and that this enabled the monarchy in the centuries to come to extend and consolidate its sway beyond the king's own domain, and ultimately over the whole of France. This is the view taken by Regnault (*Manual d'histoire du droit français*, p.93):

> Du moins l'avènement d'Hugues-Capet marque la substitution définitive d'une race nouvelle aux Carolingiens et, correlativement, la réaction des grands seigneurs qui correspond à la fin du règne de Philippe le Bel at à celui de Louis x le Hutin (1316) indique que le pouvoir royal a suffisamment progressé pour que les féodaux s'en inquiètent et tentent de l'arrêter. Vaine tentative, d'ailleurs, car la royauté ne cédera un instant que pour reprendre sa marche en avant.

With the accession of Hugues Capet, Montesquieu brings this part of his story to a close although in the last chapters 33 and 34 of Book xxxi he draws out certain other consequences of the fact that fiefs became hereditary and that the holder of a fief became king. The most important feudal characteristics carried into the monarchy were, he says, the right of the eldest son to succeed (so as to avoid dividing the fief), and the exclusion of women. Here he is interpreting, and not basing his theories on documentation; though his interpretations are logical, there is nothing final about them.

Having reached the end of Book xxxi, can we say with Jean Brethe de La Gressaye that it is a corrective by Montesquieu the historian to Montesquieu the philosopher? It seems not. Montesquieu's knowledge of French history helped to form his philosophy. He does not, at the end of Book xxxi, draw conclusions for his readers, but he certainly wishes us to take the subject further for ourselves. His last words are: 'Je finis le traité des fiefs par où la plupart des auteurs l'ont commencé' (ch.34), and in the *Pensées* he comments: 'J'aimerais mieux enseigner à considérer les lois dans leur origine, qu'à faire un livre sur l'origine des lois.'[21] Looking at Book xxxi in the context of the whole of *De l'esprit des lois*, the lesson to be drawn is that the diffusion of power, which was the essential characteristic of the feudal system, is still in accordance with the spirit of the French people. Carried to excess, so that no effective central power existed, the system produced anarchy but it also produced the remedy from within itself. France did not finally fall a prey to the ravages of invaders, nor

[21] *Pensées*, Nagel II (1831), 549, Pléiade II (433), 1116.

did it become a despotism. Instead a king, whose influence was based on his position within the feudal system, came to power. The French monarchic state, its whole civil and political organisation, has a feudal basis, and power sharing is natural to the spirit of its laws.

3. Research

THE study of Montesquieu's sources for the three books concerned with French history is a task of boundless fascination. The study is fascinating because it introduces us to a little known world, that of the scholars and historians who worked, mostly in the seventeenth and early eighteenth centuries, to collate, publish and interpret the surviving records of Western Europe's own past. The study is also boundless because it leads out from France into the surrounding countries, particularly those which had formed part of Charlemagne's empire, and backwards, from the centuries in which France acquired the institutions and practices current in Montesquieu's own time, to the feudal ages, and beyond those to the Frankish and Gallo-Roman periods. If we are to appreciate Montesquieu as an historian, we must follow him into this wide field of research.

Although, as we saw in chapter 2, the conventional terms are used in the *Lois*, the changes in dynasties are seen by the author not as marking a break but as the culmination of a process. In German tribal society the prince repelled enemies by armed force and secured loyalty by the distribution of rewards. This organisation was imported into France by the Franks under Clovis and the Merovingian dynasty, and the rewards then took the form of the grant of lands and offices which gradually became hereditary. Control of the armed forces and the distribution of rewards passed to the *maires du palais* as the titular kings became less and less effective. Once the office of *maire* became hereditary, following the general trend in society, the reality of power passed to that family and members of the family of Pepin were rulers long before Pepin III gained the title of king and so became the first member of the Carolingian dynasty. Again, the election of Hugues Capet, who founded the Capetian dynasty, was a response to the fact that the feudal system had become established everywhere in France and that only the holder of the greatest fief could exercise real power by comparison with other *seigneurs*. Montesquieu's view of history is of a process rather than a series of events.

We can appreciate why he felt it necessary to study this process in a European context. 'Les Gaules' were part of the Roman Empire. Roman law survived the break-up of the Empire, frequently co-existing with other laws, influencing them and adapting itself to changed circumstances. Then again the Frankish invasions were only one part of the exodus of German tribes over Europe, and their laws and customs had much in common with each other. In France alone four Barbarian codes of law were imported into different parts of the country – the Salic and Ripuarian laws of the Franks, the law of the Burgundians and the law of the Visigoths. Understanding of the laws in France is therefore assisted by understanding of similar laws elsewhere in Europe. Again, the evolution of France as a separate country has been a lengthy process. The descendants of Clovis were at times kings of all Franks and at times kings of various parts of the Frankish empire: Austrasia, Neustria, Burgundy. In the second race, Charlemagne, king of the Franks, built up a large empire in the West. His successors could not for long hold it together, but the idea and source of the

influence of the 'empire' remained. Finally the Church, with its own international organisation and its own canon law existed side by side with the civil powers in France as elsewhere in Europe. Because of these various influences, understanding of developments in France is inescapably linked with other European developments, as Montesquieu rightly recognised.

His documentation for the study of the development of civil and constitutional law over such a long period and in such a setting is necessarily extensive. Before considering the nature of this documentation, it is as well to say straight away that there is no evidence that he ever personally sought out original manuscripts or other evidences of the past such as inscriptions, or that he took part in the work of collating different manuscript versions of texts and editing them for publication. There is nothing in his historical writings, nothing in his notebooks – the *Pensées*, the *Spicilège* and other surviving collections of observations or résumés, nothing in the correspondence so far as we know it, to indicate that he engaged in this sort of work. If he had wished to do so, his eyesight would have been a serious handicap, but it is unlikely that he ever gave a thought to the possibility.

Why not? The simplest answer to this question is probably the best. Montesquieu was not that kind of a scholar. If he had wanted to be, the circumstances of his life were not propitious, for after a few years in Paris, he had to return to the Bordeaux region, practise law, run his estates and his wine business, attend to the succession by marrying and having a family. He had a clever and original mind, a great capacity for reading, noting and drawing comparisons, a formidable talent for observing people and institutions and the power, which he cultivated all his life, of expressing himself wittily and concisely. His frequent visits to Paris and his long tour abroad show that he did not let his responsibilities weigh too heavily on him but he was not able, probably not willing, to make his permanent home in Paris. In another chapter we will look at aspects of Montesquieu's life which illustrate his development as a scholar. Here it is enough to say that, although he undertook some scientific research and prepared papers on philosophical subjects for the Academy of Bordeaux and, in Paris, particularly after the *Lettres persanes*, he played an appreciable part in the various circles, fashionable, political and scholarly, which indeed often overlapped each other, he never formed part of the small circle of scholars engaged in detailed textual research and criticism.

It is in fact clear from Montesquieu's way of life, his commitments and his turn of mind that his approach to the study of history did not lie through textual criticism. He based the three historical books solidly on interpretation of the texts, but he took these from the printed editions available. Was he justified in relying in this way on other people's work? If we consider the circumstances, I think the answer must be yes. It is relevant to hear what the abbé Dubos, a noted scholar and perpetual secretary to the Académie française, has to say in the matter. In the preface to his *Histoire critique de l'établissement de la monarchie française dans les Gaules* published in 1734, he writes:

Plusieurs savants déterminés à ce genre d'étude par leur propre inclination ou par le motif de se rendre utiles à l'Eglise, et soutenus contre les dégouts inséparables d'un labeur si pénible, soit par les récompenses du prince, soit par les encouragements qu'ils

recevaient de la communauté dans laquelle ils étaient engagés, sont venus à bout de ce travail. Ces savants illustres dont quelques'uns ont autant de part que nos meilleurs poètes à la réputation que la nation française s'est acquise par les lettres, se sont donnés toutes sortes de peine pour déterrer, déchiffrer, conférer et éclaircir tous les monuments littéraires de nos antiquités. Grâce aux travaux de Messieurs Pithou, et de Valois, de Messieurs Jérôme Bignon, Du Cange et Baluze, comme à ceux du Père Sirmond, du Père Pétau, du Père Labbé, de Dom Luc Acheri, de Dom Jean Mabillon, de Dom Thierri Ruinart, des Bollandistes et de plusieurs autres, tous les secours qu'il nous est possible d'avoir pour éclaircir les premiers temps de notre histoire, sont depuis cinquante ans à la disposition de tout le monde. Il y a déjà quelque temps que nos antiquaires disent eux-mêmes que la moisson est achevée, et qu'ils ne font plus que glaner.[1]

Writing in 1734 the abbé Dubos, and other members of the Académie française including Montesquieu, must have known that a new and comprehensive collection of French historical texts, the *Recueil des historiens* had been in preparation by the Benedictines of St Maur under the direction of dom Bouquet since 1723, though the first volume was not to appear until 1738. Indeed, according to the historian Foncemagne (1694 to 1779), the committee set up to supervise the work on the *Recueil* was composed of Dubos, Secousse, Sainte-Palaye and Foncemagne himself.[2] If then Dubos could speak of the harvest being already gathered, Montesquieu was surely justified in thinking that sufficient material existed in print, including the five volumes of the *Recueil* published before 1748, to form a sound historical foundation on which to base his theories.

The Benedictines themselves did not see it as part of their own task to draw conclusions or construct a view of the past. Dom Bouquet in his preface to the *Recueil* writes: 'Il ne s'agit pas ici de donner une histoire mais seulement de compiler les Actes qui peuvent y servir',[3] and at the end of the preface he refers the reader who desires more knowledge of Roman Gaul to Dubos's *Histoire critique* where he will find these matters 'sçavamment discutées'. Montesquieu in his turn was justified in using the texts already available on which to base his account of history. The important thing to know is whether he used the best versions available and used them with critical judgement, and this we shall consider. Research must always continue but this does not invalidate what has already been achieved. We are indebted to those historians who, like Montesquieu, are able to step back from the mass of detail and perceive the trends of development in past and present societies.

Since Montesquieu did not use original manuscript material, let us consider the sources, all of which were in print, which he actually used and how these are related to the period and the region with which he was concerned. In subsequent chapters we will consider how he probably obtained his documentation and then the use he made of it. First, however, it will be useful to identify the types of documentation to which he refers. In all, he refers to about fifty works including such collections as the *Historiae Francorum scriptores* of Duchesne and the *Recueil des historiens* which in themselves contained many individual

[1] Dubos, *Histoire critique* 1, Discours préliminaire, p.47.

[2] Bn n.a.f. 3294, f.f. 212-17, paper by Foncemagne on the publication of the medieval chronicles. Quoted by L. Gossman, *Medievalism and the ideologies of the Enlightenment* (Baltimore, Maryland 1968), p.235.

[3] *Recueil des historiens* 1, Preface, p.iv.

histories, annals, lives and so on. He returns to some of them time and again, while others are just the subject of a passing reference. Looking at the documentation as a whole, it is possible to see three strands, distinct though interrelated, in the documentation which he used to illustrate his themes.

To begin with, there are the authors who wrote in Latin or Greek, of Rome and the Roman Empire. Caesar and Tacitus are witnesses to conditions in Gaul before and after the Roman occupation. Montesquieu also refers frequently to Tacitus, particularly the *De moribus Germanorum*, for information about the social organisation of the German tribes who spread out not only into Gaul but over much of the rest of Europe. He uses the later historians of the Empire: Procopius of Caesarea, Cassiodorus, Agathias, Zosimus, for information about certain points. These authors wrote the best contemporary accounts available, but the information they give is disappointingly incomplete for the history of France. As Dubos explained, in discussing the same authors, they mentioned facts relevant to the history of France only in passing in order to illustrate their main theme. Dubos's explanation is (as usual) too lengthy to quote in full, but one extract concerning Procopius is typical of the rest:

> Je reviens à Procope. Il avait de la capacité. Ainsi l'abrégé de l'histoire de l'établissement de la monarchie française qu'il nous donne, doit être regardé comme la relation la mieux suivie, et la plus méthodique que nous ayons de la fondation de cet état. Mais d'autant que Procope ne dit des Francs tout ce qu'il en écrit dans l'onzième chapitre du premier livre de la guerre gothique et dans les chapitres suivants, que par forme de digression, et plutôt afin de faire souvenir les lecteurs de ce qu'ils auraient déjà lu ailleurs, que pour faire l'histoire de la nation des Francs, il néglige de dater les événements dont il parle, et presque toujours il les rapporte dénués de circonstances propres à faire démêler en quelle année ils sont arrivés. Sans qu'il y ait pour cela de la faute de l'historien, nous avons autant de peine à bien entendre l'abrégé, que nos neveux en auraient à bien entendre les abrégés de l'histoire générale des Pays-bas que Grotius, Bentivoglio, le Connestagio et Strada ont mis à la tête de leurs histoires particulières des troubles survenus dans ces contrées pendant le seizième siècle, si ces neveux n'avaient plus les annales et descriptions des dix-sept provinces que nous avons aujourd'hui, et qui étaient déjà entre les mains de tout le monde, quand Grotius et les autres écrivains, dont je viens de parler, ont composé leurs écrivages.[4]

Montesquieu does not repeat this clear though wordy explanation but apart from the use he makes of the *De moribus Germanorum* his references to Latin and Greek historians are sparing.

The second element in his documentation is much more important. It consists of the legal enactments and customs of France through the centuries, frequently supplemented by the parallel acts and customs of other European countries since Montesquieu is always mindful of the links between France and the rest of Western Europe. Many relevant manuscripts had survived and were available in print. Thus he was able to refer to codes of law including the Roman codes which still formed such an important part of French law and the Barbarian codes. Also available to him were a very considerable number of capitularies, edicts formulas, constitutions, charters and 'ordonnances' from the Merovingian period onwards, the establishments and collections and interpretations of custom-

[4] Dubos, *Histoire critique*, 1, Discours préliminaire, pp.33-34.

ary law made from about the time of Saint Louis in the thirteenth century, and the collections of decrees of the parlement of Paris and provincial parlements. He also refers to the canon law of the Church which developed alongside the civil and constitutional law. He was of course writing a historical account of the development of law in France rather than a history of France and this concentration on the legal aspect is his distinctive contribution to the writing of history.

It may be because his approach was so original that the debt he owes to other historians, the third strand in his documentation, is difficult to assess. Of course he made ample use of the early histories and chronicles. Among the most important were the history composed by Gregory of Tours and its various continuations, the lives of Charlemagne, particularly the one composed by Eginhard, and the life of Saint Louis by Joinville. He also refers to many other early historical accounts including, with due precautions, the lives of the saints. He freely acknowledges the work of the scholars and commentators who edited and annotated the manuscript material. For example, he refers frequently to Du Cange, both the *Glossarium* and the editions of texts, to the compilations of Baluze and Duchesne, and when he mentions the *Livres des fiefs*, he almost always refers also to the commentary by Jacques Cujas. On the other hand, when it is a question of a view of history, rather than the edition of a text, he scarcely ever mentions another historian except to castigate him. There are for example passing references to Loyseau, author of the *Traité des justices de villages* published in 1525: 'Loyseau les fait raisonner [les seigneurs] comme, dans son cabinet, il raisonnait lui-même' (*Lois*, xxx, 20) and to Lecointe, author of the *Annales ecclesiastici Francorum* published 1665-1683 (*Lois*, xxxi, 16):

> Le Père le Cointe, malgré la foi de tous les monuments, nie que le pape ait autorisé ce grand changement [transfer of the crown to Pepin]; une de ses raisons est qu'il aurait fait une injustice. Et il est admirable de voir un historien juger de ce que les hommes ont fait, par ce qu'ils auraient dû faire! Avec cette manière de raisonnner il n'y aurait plus d'histoire.

When he comes to his contemporaries Boulainvilliers and Dubos, he finds that the theories of both these scholars concerning the monarchy are built on fundamental errors. It seems therefore that in the three historical books Montesquieu relies on other scholars for his material but that the conclusions he draws from the material are his own. The theories of others did not greatly influence him except that they provided a starting point and a stimulus to his own work.

We shall see when we look at the sources in greater detail in a future chapter that he was discriminating in his use of printed material. He took pains to keep his documentation up to date and if he prefers an earlier edition to a later one, there is probably a sufficient reason. In the present chapter, it would be misleading to conclude this general account of his sources without acknowledging that, although he did not use original manuscripts, he brought an informed and critical approach to the printed texts. From many possible examples I have chosen one from each book to illustrate this point.

In Book xxviii he traces the development of civil law and recognises the importance of the compilation which went by the name of the *Etablissements de Saint Louis*. In chapter 37 he clears away the theory that the *Etablissements* were a code drawn up by the king to apply to the whole of France. He says:

Le code que nous avons sous le nom d'*Etablissements de Saint Louis* n'a jamais été fait pour servir de loi à tout le royaume, quoique cela soit dit dans la préface de ce code. Cette compilation est un code général qui statue sur toutes les affaires civiles . . . Or, dans un temps où chaque ville, bourg ou village avait sa coutume, donner un corps général de lois civiles, c'était vouloir renverser dans un moment toutes les lois particulières sous lesquelles on vivait dans chaque lieu du royaume. Faire une coutume générale de toutes les coutumes particulières serait une chose inconsidérée, même dans ce temps-ci, où les princes ne trouvent partout que de l'obéissance. Car, s'il est vrai qu'il ne faut pas changer lorsque les inconvénients égalent les avantages, encore moins le faut-il lorsque les avantages sont petits, et les inconvénients immenses. Or, si l'on fait attention à l'état où était lors le royaume, où chacun s'enivrait de l'idée de sa souveraineté et de sa puissance, on voit bien qu'entreprendre de changer partout les lois et les usages reçus, c'était une chose qui ne pouvait venir dans l'esprit de ceux qui gouvernaient.

Montesquieu goes on to argue from this that the code could not have been confirmed 'en parlement par les barons et gens de loi du royaume', as is said in a manuscript from the hôtel de ville of Amiens, cited by Du Cange. Nor can it have been promulgated by Saint Louis in 1270 before he left for Tunis as is stated in other manuscripts, because Saint Louis left in 1269 as Du Cange had already remarked. Du Cange had said that the code appeared to have been published during the king's absence. Montesquieu takes issue with him on this (and it was no light thing to differ from such a scholar):

Mais je dis que cela ne peut pas être. Comment Saint-Louis aurait-il pris le temps de son absence pour faire une chose que aurait été une semence de troubles, et qui eût pu produire non pas des changements, mais des révolutions? Une pareille entreprise avait besoin, plus qu'une autre, d'être suivie de près, et n'était point l'ouvrage d'une régence faible, et même composée de seigneurs qui avaient intérêt que la chose ne réussit pas.

He is feeling his way to his own conclusions. These are that the code was not published until the last year of Saint Louis's reign or after his death, and that it was not a set of laws for the whole kingdom but a compilation of customary law, for the king's own domain, of a similar type to the collections made by Philippe de Beaumanoir and Pierre de Fontaines, also in the thirteenth century. As we shall see in chapter 9 below, his historical sense did not lead him astray when he reached these conclusions. That the *Etablissements* were indeed a collection of customary law was established finally by Paul Viollet, in what Chénon describes as his 'magistrale édition critique, précédée d'une introduction de 480 pages, dans laquelle il étudie successivement les sources, le contenu, l'influence et le manuscrit du coutumier.'[5] This edition (in four volumes, Paris 1881) appeared more than one hundred and thirty years later than *De l'esprit des lois* and has not been superseded. It is interesting to find this vindication of Montesquieu's critical insight into a text.

In Book xxx there is another example of Montesquieu's use of texts. This is in connection with his theory, midway between the theories of Boulainvilliers and Dubos, concerning the origins of the French monarchy and the relationship between the king, the nobles and the people. He himself remarks in chapter 10 of Book xxx about his two predecessors: 'M. le comte de Boulainvilliers et M. l'abbé Dubos ont fait chacun un système dont l'un semble être une conjuration

[5] *Histoire du droit français* i, 220, p.555. See also chapter 9 below, pp.140-42.

contre le tiers-état, et l'autre une conjuration contre la noblesse'. The rival theories have been discussed in a previous chapter. In denouncing them and putting forward his own account, Montesquieu bases himself on the texts and on inferences which he draws from the texts. He does not think with Boulainvilliers that the invading Barbarians took all the land of Roman Gaul as their own property and enslaved the Gallo-Romans. The Salic and Ripuarian laws of the Franks do not mention the division of lands, but Montesquieu looks at the laws of the Burgundians and argues thus (*Lois*. xxx, 10):

Il est dit dans la loi (a) des Bourguignons, que quand ces peuples s'établirent dans les Gaules, ils reçurent les deux tiers des terres et le tiers des serfs. La servitude de la glèbe était donc (b) établie dans cette partie de la Gaule avant l'entrée des Bourguignons.

La loi des Bourguignons, statuant sur les deux nations, distingue (c) formellement, dans l'une et dans l'autre, les nobles, les ingénus et les serfs. La servitude n'était donc point une chose particulière aux Romains, ni la liberté de la noblesse une chose particulière aux Barbares.

Cette même loi dit (d) que si un affranchi bourguignon n'avait point donné une certaine somme à son maître, ni reçu une portion tierce d'un Romain, il était toujours censé de la famille de son maître. Le Romain propriétaire était donc libre, puisqu'il n'était point dans la famille d'un autre; il était libre puisque sa portion tierce était un signe de liberté.

Il n'y a qu'à ouvrir les lois saliques et ripuaires pour voir que les Romains ne vivaient pas plus dans la servitude chez les Francs que chez les autres conquérants de la Gaule.

M. le comte de Boulainvilliers a manqué le point capital de son système, il n'a point prouvé que les Francs aient fait un réglement général qui mît les Romains dans une espèce de servitude.

Notes: (a) Titre LIV.
(b) Cela est confirmé par tout le titre du Code *de agricolis et censitis et colonis*.
(c) Si dentem optimati Burgundioni vel Romano nobli excusserit, Tit. XXVI, para.1; et *se mediocribus personis ingenuis, tam Burgundionibus quam Romanis, ibid*, para 2.
(d) Titre LVII.

Montesquieu's argument is very similar to that of Ferdinand Lot, who writes in *Naissance de la France* (p.18):

Le détail de sa conquête [la conquête de Clovis] nous échappe. Peut-on même parler de 'conquête'? Le roi salien ne faisait pas la guerre aux populations gallo-romaines, mais aux faibles débris d'autorité romaine subsistant en Gaule. Et ce qui tendrait à le faire croire, c'est qu'il n'est question nulle part d'un partage de terre entre vainqueurs et vaincus, ni même du régime de l'*hospitalité* pratiqué par Goths et Burgondes tant qu'ils furent au service de l'Empire. Qu'il y ait eu des violences, des spoliations aux dépens des indigènes, surtout des grands propriétaires, des sénateurs, c'est plus que probable, et le contraire serait très étonnant. Le roi a mis la main sur les domaines impériaux. Il en a gardé bien nombre. Il en a distribué d'autres à ses fidèles. Mais de là à un partage à la façon des Lombards, il y a loin [...] Cela est de conséquence. La 'conquête' de Clovis n'a pas laissé de ces haines tenaces que provoque une spoliation massive. On ne s'expliquerait pas, s'il en avait été ainsi, le rapide rapprochement des indigènes et des Saliens.[6]

The refutation of Dubos is contained in chapters 23 to 25 of Book xxx. Dubos's position is summarised in two sentences:

[6] See also chapter 9 below, pp.133-34

M. l'abbé Dubos veut ôter toute espèce d'idée que les Francs soient entrés dans les Gaules en conquérants: selon lui, nos rois, appelés par les peuples, n'ont fait que se mettre à la place, et succéder aux droits des empereurs romains. [ch.24]

M. l'abbé Dubos soutient que, dans les premiers temps de notre monarchie, il n'y avait qu'un seul ordre de citoyens parmi les Francs. [ch.25]

Montesquieu's own very closely reasoned argument, packed with references to texts, should be read in full. Here one example must suffice. The subject under discussion is the decree of 596 issued by Childebert II.

Dubos argued that this decree shows that all free men guilty of theft were subject to the direct justice of the king. The passage in question, quoted by Montesquieu in Latin, from the *Capitularia* (I.29) of Baluze, and by Dubos in French is: 'Itaque Colonia convenit et ita bannivimus ut unusquisque judex criminosum latronem ut audierit ad casam suam ambulet, et ipsum ligare faciat; ita ut, si Francus fuerit, ad nostram praesentiam dirigatur; et si debilior persona fuerit, in loco pendatur.' Dubos, basing himself on Du Cange, translates 'Francus' not as a Frank but as a freeman and this leads him to take 'debilior persona' to mean a serf. Montesquieu argues on the contrary:

J'ignorerai pour un moment ce que peut signifier ici le mot *Francus*; et je commencerai par examiner ce qu'on peut entendre par ces mots *une personne plus faible* [debilior persona]. Je dis que, dans quelque langue que ce soit, tout comparatif suppose nécessairement trois termes, le plus grand, le moindre et le plus petit. S'il n'était ici question que des hommes libres et des serfs, on aurait dit *un serf* et non pas *un homme d'une moindre puissance*. Ainsi *debilior persona* ne signifie point là un serf, mais une personne au-dessous de laquelle doit être le serf. Cela supposé, *Francus* ne signifiera pas un homme libre, mais un homme puissant: et *Francus* est pris ici dans cette acception, parce que, parmi les Francs, étaient toujours ceux qui avaient dans l'Etat une plus grande puissance, et qu'il était plus difficile au juge ou au comte de corriger. Cette explication s'accorde avec un grand nombre de capitulaires qui donnent les cas dans lesquels les criminels pouvaient être renvoyés devant le roi, et ceux où ils ne le pouvaient pas.[7]

Jean Brethe de La Gressaye comments on this argument: 'Les historiens modernes interprètent l'édit de Childebert de 596 dans le sens indiqué par Montesquieu: le tribunal du roi était compétent, à l'exclusion de celui du comte, pour les délits commis par les grands' (*Lois*, book XXX, note 87). As an authority he cites Chénon, *Histoire du droit français*, 108.

For the third example of Montesquieu's critical and informed use of texts, we can turn to Book XXXI. This is the book in which he discusses the relationship between the development of feudal laws and the changes in the monarchy. He identifies certain turning points or 'revolutions' and, as previously mentioned, one of these is the edict of 614 which followed the conspiracy against the queen-regent Brunehault.[8]

At the end of chapter 1 and in chapter 2 Montesquieu refers to a constitution which he considers to be subsequent to and connected with the edict of 614. In this he opposes Baluze and his argument is as follows (*Lois*, XXXI, 2):

Il est vrai que M. Baluze, trouvant cette constitution sans date, et sans le nom du lieu

[7] *Lois*, XXX, 25. In a footnote the reader is referred to Books XXVIII and XXXI for details of the capitularies.

[8] See chapter 2 above, pp.33-35.

où elle a éte donnée, l'a attribuée à Clotaire ier. Elle est de Clotaire ii. J'en donne trois raisons:

1. Il y est dit que le roi conservera les immunités (a) accordées aux églises par so père et son aïeul. Quelles immunités aurait pu accorder aux églises Childéric, aïeul de Clotaire ler, lui qui n'était pas chrétien, et qui vivait avant que la monarchie eût été fondée? Mais, si l'on attribue ce décret à Clotaire ii, on lui trouvera pour aïeul Clotaire ier lui-même, qui fit des dons immenses aux églises pour expier la mort de son fils Cramne qu'il avait fait brûler avec sa femme et ses enfants.

2. Les abus que cette constitution corrige, subsistèrent après la mort de Clotaire ier, et furent même portés à leur comble pendant la faiblesse du règne de Gontrant, la cruauté de celui de Chilpéric, et les détestables régences de Frédégonde et de Brunehault. Or, comment la nation aurait-elle pu souffrir des griefs si solennellement proscrits, sans s'être jamais récriée sur le retour continuel de ces griefs? Comment n'aurait-elle pas fait pour lors ce qu'elle fit lorsque Chilpéric ii (b) ayant repris les anciennes violences, elle le pressa (c) d'ordonner que, dans les jugements, on suivît la loi et les coutumes, comme on faisait anciennement?

3. Enfin, cette constitution, faite pour redresser les griefs, ne peut point concerner Clotaire ier, puisqu'il n'y avait point sous son règne de plaintes dans le royaume à cet égard, et que son autorité y était très affermie, surtout dans le temps où l'on place cette constitution; au lieu qu'elle convient très bien aux événements qui arrivèrent sous le règne de Clotaire ii, qui causèrent une révolution dans l'état politique du royaume. Il faut éclairer l'histoire par les lois et les lois par l'histoire.

Notes: (a) J'ai parlé au livre précédent [ch.xxi] de ces immunités, qui étaient des concessions de droits de justice, et qui contenaient des défenses aux juges royaux de faire aucune fonction dans le territoire, et étaient équivalentes à l'érection ou concession d'un fief.
(b) Il commença à régner vers l'an 670.
(c) Voy. la vie de *saint Leger.*

Jean Brethe de La Gressaye points out that the attribution of this constitution is still questioned today and refers to an article by Handelsman: 'Le soi-disant précepte de 614' in *Le Moyen Age* (1926), p.121 (*Lois*, book xxxi, note 11).

I am not of course arguing that Montesquieu was always right in his interpretation of texts. The notes to m. de La Gressaye's critical edition show a number of instances where his interpretation was insufficient or mistaken. To give two examples mentioned in this study: he speaks of different stages of the development of the feudal system as if they were all the same (e.g. see page 30 above), and he tends to underestimate the length of the process which transformed offices and lands granted for life into hereditary possessions (e.g., in connection with the office of count, see page 39 above). Otherwise, apart from matters of detail, perhaps his most serious failure of interpretation concerns the role of the Church in France during the period under review, but this role has been considered only incidentally in the present study. Nevertheless Montesquieu seems to have handled the texts with both erudition and imagination. He questioned the conclusions of other historians and arrived at an independent view of French history. This view was influential in later years. In another chapter we shall consider the place he held amongst those historians who at about the same time were considering the nature and history of the French constitution.

4. The making of a scholar

In this chapter I propose to look at certain aspects of Montesquieu's career which illustrate his formation as a scholar and throw some light on the approach he adopted in the composition of the three historical books.

First we may consider his education at the Oratorian college or 'Académie royale' of Juilly. The important legal families of seventeenth- and eighteenth-century France gave considerable attention to the education of their sons and this was one of the sources of their strength and influence.[1] Juilly was a college of high repute and the education which Montesquieu received there probably had a lasting effect on his career.

Then, we should look briefly at his legal education and his career as a lawyer and magistrate. Not that it was a glorious career though he seems to have earned the respect and indulgence of his colleagues, but the formation of the man of law put its stamp on the man of letters.

It is relevant also to consider his contribution to the work of the Academy of Bordeaux from 1716, when he was elected, to 1725, after which time he ceased to take part regularly in its deliberations, though he always retained his interest in, and affection for the body he describes as 'Notre Académie'.[2] This was the forum in which, from the age of twenty-seven and to the age of thirty-six, he presented his work and discussed it with his fellow members. The records of his activities with this Academy suggest some of the foundations on which his later work was built.

From 1727 he became a member of the more prestigious body, the Académie française. His first completed serious work of substance, the *Considérations sur les causes de la grandeur des Romains et de leur décadence*, was presented to this body, as well as to the Royal Society in London. Here we have a work much more akin to the historical books of the *Lois* than any of his early efforts and it is relevant to consider his standing in the Académie and the influence it had on his development as well as to look briefly at the *Considérations*.

This was the preparation which led up to the composition of the major work, *De l'esprit des lois*, including the books on French civil and constitutional law. The preparation does not explain the work, but some understanding of Montesquieu's scholarship and achievements before he embarked on his major work may help us to appreciate his qualifications for the task and also perhaps some of the reasons for the enduring value of the result.

Charles Louis de Secondat, baron de La Brède and later baron de Montesquieu was born in 1689 into an eminent provincial legal family. His grandfather, Jean-Baptiste-Gaston de Secondat was son-in-law of a *premier président* called Dubernet of the parlement of Guyenne or Bordeaux, and himself became counsellor and then *président à mortier*. He was followed by his son, Jean Baptiste de Secondat, uncle of Montesquieu and in his time a magistrate of very high

[1] See for example, F. L. Ford, *Robe & sword* (Cambridge, Mass. 1953), pp.216-21

[2] For example, Montesquieu to Martin Ffolkes, 12.2.1741. *Correspondance*, Nagel iii.1005.

repute. This gentleman, having lost his only son, made his nephew the heir to his property and office.

At the age of eleven the young Baron de La Brède was sent to the Oratorian college of Juilly, not far from Paris. Little personal information concerning his school days has survived but it is worth remarking some characteristics of the education provided at Juilly which seem to have had an influence on his formation as a historical scholar.

Juilly was founded by Charles de Condren, Superior General of the Congregation of the Oratory, in 1638. Charles Hamel, who wrote a history of the college, describes its standing in these terms:

> Entre tous les collèges de l'Oratoire la maison de Juilly a toujours occupé le premier rang. Ses élèves se recrutaient, pour la plupart, dans les familles les plus distinguées du pays. Ses maîtres étaient choisis parmi les sujets les plus brillants de l'Institution; son enseignement jouissait d'une grande réputation; et c'était un insigne honneur pour les jeunes confrères de venir en occuper les chaires.[3]

A point of particular interest is that the study of history, not much favoured in most schools at that time, was encouraged by the Oratorians, and had a special place in the curriculum at Juilly. It was taught in every class division, beginning with Biblical history for the youngest, then Greek and Roman history, and finally a three year course in French history, as Hamel tells us:

> l'histoire de France, comme la plus importante, était l'objet d'un cours spécial de trois années, fait aux élèves des hautes classes. Pour leur en inspirer davantage le goût, comme aussi pour leur faire aimer la lecture, l'aliment des fortes études, on avait formé, à leur usage, une bibliothèque de choix, composée d'ouvrages assez nombreux, de différents genres, de littérature, de philosophie, de morale, de piété, mais surtout d'histoire générale et nationale, ancienne et moderne.[4]

It seems clear therefore that at Juilly Montesquieu was able to obtain, and presumably did obtain, a good grounding in ancient and modern history, particularly French history and so, when he wished to return to the subject, he had a reasonably good idea of what to look for and where to find it. Moreover *De l'esprit des lois*, including the historical books, seems to bear the marks of the method of study encouraged by the Oratorians, as H. Roddier has pointed out.[5] Le père Bernard Lamy (1640 to 1715), a priest of the Oratory and in the earlier part of his career a controversial figure because of his uncompromising support for the philosophy of Descartes, produced a work, intended for the pupils of Oratorian schools, which seems to have influenced at least some of those pupils very considerably. The work in question is the *Entretiens sur les sciences, dans lesquels on apprend comme l'on doit se servir des sciences pour se faire l'esprit juste et le cœur droit, avec la méthode d'étudier*. This was first published in 1685, again in an augmented edition in 1694 and again in 1706 when Montesquieu was a pupil at Juilly. The work remained in use for some time – the notice on Bernard Lamy

[3] C. Hamel, *Histoire de l'Abbaye et du Collège de Juilly* (Paris 1868), p.189.

[4] C. Hamel *Histoire de Juilly*, pp.220-21.

[5] H. Roddier, 'De la composition de *L'Esprit de lois*: Montesquieu et les Oratoriens de l'Académie de Juilly, *RhlF* 52 (1952), pp.439-50.

in the *Biographie universelle* (XXIII.91) speaks of a seventh edition of the *Entretiens* in 1724. Lamy himself regarded the *Entretiens* as an introduction to study:

> Ainsi qu'on n'attende rien de grand de cet ouvrage. Ce n'est pas que l'on n'y jette de solides fondements, sur lesquels on peut élever un édifice aussi haut qu'on le voudra faire. On y ouvre des chemins pour pénétrer dans les sciences aussi avant qu'on y soit jamais allé; mais enfin le but n'est que de régler les premières études, et celles qui sont absolument nécessaires.[6]

In discussing the *Entretiens*, it is usual to add that Rousseau in Book VI of the *Confessions* says that he had read and re-read them a hundred times and resolved to take them as his guide. It would be unlike Montesquieu to acknowledge a debt to another writer so openly and enthusiastically, but, as Roddier demonstrates, he seems to have been profoundly influenced by the methods advocated by Lamy. Roddier mentions the sixth 'Entretien' (pp.217 to 277 in the 1706 edition), which is particularly concerned with methods of study. It begins: 'La connaissance des bons livres doit faire une des principales parties d'un traité des études'. The author describes how to use a library, how to find out the best authors and editions and recommends ways of taking notes and making abridgements. The short section devoted particularly to history (pp.238-41) is of interest for our purposes. In speaking of the studies required for writing a worthwhile history of France, Lamy draws attention to general histories, histories of each province and the various rulers, histories of dioceses, towns, abbeys, lives of famous people including saints, treaties, acts, letters, memoirs, portraits, medals, inscriptions. He ends with this good advice (p.241 in the 1706 edition):

> Souvenez-vous de ce que nous vous disons ici; afin que si jamais vous vous appliquez à l'histoire, que vous vouliez étudier à fond celle de quelque siècle, soit par rapport à l'Eglise ou dans quelque autre vûe, vous ne croyiez pas qu'il suffise de lire un petit nombre d'auteurs, comme font la plupart de ces écrivains, qui ne se donnent point de peine, qui enseignent ce qu'ils n'ont point appris, et qui veulent qu'on les croie sur leur parole.

We shall see later how faithfully Montesquieu followed this counsel, at least as regards the printed word. Lamy would surely have regarded him as a credit to the Oratorian system.

After leaving Juilly in 1705 Montesquieu went to Bordeaux University to study law, and in 1708 he took the degree of bachelor and licencié and qualified as an advocate.[7] Again there is little personal information available about this period in his life, though the notes on Roman law in his *Collectio juris* (see Appendix) may have been made at this time. However it is worthwhile looking at the sort of education provided and, for this purpose, a book by Alfred de Curzon is a valuable source.[8]

A serious effort to codify French law had been made in the previous century, and this was followed by measures to improve the education of future practi-

[6] Bernard Lamy, *Entretiens sur les sciences*, 3rd ed. (Lyon 1706), Preface (second page, not numbered).

[7] R. Shackleton, *Montesquieu*, p.8.

[8] A. de Curzon, *L'Enseignement du droit français dans les universités de France aux XVIIe et XVIIIe siècles* (Paris 1920).

tioners. Louis XIV introduced a series of Ordinances, of which the most important were those on civil procedure in 1667, criminal procedure in 1670 and commercial law in 1673. Then came the edict of Saint-Germain-en-Laye in April 1679 which made it mandatory for universities to provide instruction in French law. Alfred de Curzon (p.29) quotes the vital provision in article 14 of this edict:

> et afin de ne rien omettre de ce qui peut servir à la parfaite instruction de ceux qui entrent dans les charges de judicature, nous voulons que le droit français, contenu dans nos ordinances et dans les coutumes, soit publiquement enseigné, et, à cet effet, nous nommerons des professeurs qui expliqueront les principes de la jurisprudence française et qui en feront des leçons publiques.

The seriousness of the king's intention is shown by other provisions in this and subsequent measures. The choice of professor of French law was not left to the universities themselves, as was customary for other posts, but was made by the king from among three candidates, with at least ten years experience as advocates or 'jurisconsultes', nominated by the appropriate *parlement*. The first *professeur royal*, de Launay, was appointed by a decree of the Council of State dated 16 November 1680 to the University of Paris. There followed appointments to all other universities, including the appointment of Blaise Fresquet in 1681 to the University of Bordeaux where he remained until 1711, so that he must have taught Montesquieu. The *professeur royal* ranked next after the dean of the faculty, an important consideration at a time when precedence was a matter of great consequence and, though he could retire after twenty years, almost all, including Blaise Fresquet, remained in office till they died.

It is apparent that Montesquieu followed the usual three-year course for the licentiate in law. The last year of this course was devoted to French law, with five lessons a week, ending with an oral examination. It was important to graduate because a further *déclaration* of 26 January 1680 made it impossible for anyone who was not a law graduate and an advocate to practise even in the seigneurial courts. Certainly, however, a three-year course, with only one year specifically on French law, was not nearly enough to cover the ground.

The legal situation in France was very complex since, in spite of Louis XIV's reforms, the country was still divided into 'pays de droit écrit' and 'pays de coutumes' although, as Emile Chénon explains, this division was not nearly so absolute as is sometimes supposed:

> En somme, le droit romain avait autorité partout dans la France; c'était une question de degré: il était coutume générale dans le Midi, droit supplétif dans les coutumes que l'on vient d'énumérer [les coutumes de Berry, Haute-Marche, et Bourbonnais, limitrophes des pays de droit écrit; les coutumes de Bourgogne, Franche-Comté, et les Trois-Evêchés, limitrophes des Terres d'Empire, où le droit romain était 'reçu' et un certain nombre de coutumes flamandes], raison écrite dans les autres.[9]

Chénon goes on to explain that Roman law or 'droit écrit' was in force for the whole area within the jurisdiction of the parlement of Bordeaux, except for 'la petite Coutume de Saint-Jean d'Angély'. This area was quite wide and though Roman Law was the rule, account had to be taken of purely local customs: 'Il

[9] Chénon, *Histoire du droit français*, ii.332-33.

y avait d'autres coutumes dans le ressort; mais celles-ci ne pouvaient être regardées que comme coutumes locales par rapport au droit romain, qui était la coutume générale: les principales étaient les coutumes des villes de Limoges, Agen, Bergerac, Bordeaux et pays Bordelais, et plusieurs petites coutumes dans les landes.'[10]

After graduation, Montesquieu spent some years in Paris, where he probably spent some of his time on legal studies. At any rate, as we shall see in the Appendix, he thought it worthwhile to attend some cases in the Paris courts and to take notes. He knew of course that the intention was for him to succeed his uncle as a *président* in the *parlement* of Bordeaux as well as in his estates and he appears to have acquiesced happily in this arrangement which would give him a good position in his own part of France and a sufficient income. He returned to Bordeaux on his father's death in 1713, became counsellor in 1714 and *président* after his uncle's death in 1716.

The *parlements* were not, by this time, legislative bodies, in the sense that they could originate legislation. They could only register the royal decrees. Chénon sums up the legislative position towards the end of the 'ancien régime': 'Il restait: 1° pour le droit privé, les coutumes rédigées et le droit romain, c'est-à-dire deux éléments morts; 2° pour le droit public et le droit privé à la fois, les ordonnances royales, élément au contraire très vivant, auquel on peut ajouter, pour être complet, les arrêts de règlement des cours souveraines.'[11]

The parlement of Bordeaux was one of the sovereign courts of the realm and the magistrates were responsible for interpreting and applying the law in the area of their own jurisdiction. In their deliberations they would take account of previous decisions, both by their own *parlement* and by other sovereign courts. It was, moreover, necessary to know at least something of the customary laws in force elsewhere as these might affect the cases which came up for trial.

In fact many complex considerations had to be taken into account in arriving at a decision. Boscheron des Portes, in describing the matter, is able to choose an almost completely different set of illustrations from those selected by Emile Chénon. He says, in discussing the work of administering the law:

> Mission singulièrement plus ardue qu'elle ne l'est aujourd'hui. Pour nous borner au parlement de Bordeaux, que de matières diverses de législation ses membres n'étaient-ils pas astreints à posséder pour en faire l'application journalière! C'était, avant tout, le droit romain ou écrit, droit commun de toutes les provinces du Midi, ensuite les coutumes locales de Bordeaux, de Bayonne, de Dax, de Saintes, de Saint-Jean-d'Angely, de Saint-Sever, les usances de Marsan, Cursan, Gabardon et autres contrées du ressort.[12]

Just to add to the confusion, Henri Regnault comments:

> Le droit romain n'est pas le droit exclusif de la France du Midi. On y rencontre d'assez nombreuses coutumes, outre celles qui sont purement locales comme les coutumes de Toulouse et de Montpellier. On peut citer les coutumes générales de Bordeaux, de Navarre, de Béarn. A ce point que le parlement de Bordeaux refusera toujours de se

[10] Chénon, *Histoire du droit français*, ii.333.

[11] Chénon, *Histoire du droit français*, ii.321.

[12] C. B. F. Boscheron Des Portes, *Histoire du Parlement de Bordeaux* (Bordeaux 1878), i.39.

laisser compter parmi les parlements de droit écrit, motif pris de ce qu'il n'applique le droit romain que dans le silence de la coutume.[13]

Montesquieu's *Collectio Juris* contains, in addition to the résumé of Roman law, notes on a number of matters, including customs, ordinances, case-law and cases actually attended, all showing that he felt the need to continue his legal education. He actually practised as counsellor and then as *président* at the parlement of Bordeaux for twelve years, from 21 March 1714 to 7 July 1726.[14] It seems that he tried hard but found procedural details wearisome: 'Quant à mon métier de président, j'avais le cœur très droit; je comprenais assez les questions en elles-mêmes; mais quant à la procédure, je n'y entendais rien. Je m'y étais pourtant appliqué; mais ce qui m'en dégoutait le plus, c'est que je voyais à des bêtes ce même talent qui me fuyait, pour ainsi dire.[15] He might, like other men, have continued in a not very congenial career, but by 1726 his fame as a scholar and writer was becoming established. He had his considerable property and wine trade to provide a sufficient income, and so felt able to sell (though not at first outright) his office of *président* and free himself to live in Paris whenever he pleased and to travel abroad. Nevertheless one can see that experience of the practice of the law in all its complexity was one of the influences which led him to try to seek out both the underlying principles of laws and, at the end of *De l'esprit des lois*, the history of the development of civil and constitutional law in France. He knew the system as it existed in his own time and had exercised responsibilities within it; he was to move on from that to the greater task of examining the reasons behind the laws and the ways in which they had developed.

Let us look now at the academic side of Montesquieu's development. In the same year, 1716, as he became *président*, he also became a member of the Academy of Bordeaux. No doubt he was already known as a man of scholarly tastes, though so little survives from his first period in Paris that there is not much evidence for this. However, we know from a letter which he wrote the day after his reception at the Academy, which took place on 3 April 1716, that he was friendly with le père Desmolets and with Nicolas Fréret, both of whom were active in the intellectual life of Paris.[16] Fréret, born 15 February 1688, was almost a year older than Montesquieu, born 18 January 1689. As boys, both of them attended the Oratorian college at Juilly, and no doubt that was where they first met. Desmolets, born 1678, was only ten years older. He became a priest of the Oratory in 1701, and probably taught both Montesquieu and Fréret. Later he took charge of the important Oratorian library in Paris and became a well-known editor. Fréret's early and lasting dedication to a life of scholarship is well attested, and he was to become perpetual secretary of the Académie des inscriptions et belles lettres.[17] There is one record of Montesquieu's

[13] H. Regnault, *Manuel d'histoire du droit français* (Paris 1940), pp.112-13.

[14] See J. Dalat, *Montesquieu magistrat au parlement de Bordeaux*, Archives des lettres modernes 132 (1971).

[15] *Pensées* Nagel ii (213(4)), 86; Pleiade i (4), 977.

[16] Montesquieu to Desmolets, Nagel iii.729.

[17] For a recent study of Fréret, see R. Simon, *Nicolas Fréret académicien*, Studies on Voltaire 17 (Genève 1961). There is however still uncertainty as to whether this man,

scholarship, dating from the first stay in Paris, which, in addition to its intrinsic importance, illustrates the link between the three men. In the *Geographica II*[18] there is a résumé of twenty pages entitled 'Quelques réflexions sur la Chine, que j'ai tirées de mes conversations avec M. Hoange.' André Masson has given the following appreciation of these 'réflexions' (Nagel ii, Introduction, p.xxvi):

> En vingt pages, Montesquieu définit le culte des ancêtres, analyse le mécanisme des caractères chinois, décrit les examens triennaux et conte quelques traits de mœurs. Cet exposé est si précis qu'un sinologue du xxe siècle n'y trouverait guère à redire. Il est tout-à-fait remarquable, à la date à laquelle ces pages ont été écrites, en 1712 ou 1713 comme on le verra, c'est-à-dire 17 ou 18 ans avant la grande publication du Père du Halde qui devait rendre familières ces notions au public cultivé.

Arcadio Hoang, with whom Montesquieu held these conversations, was a very unusual immigrant to France. He was Chinese, son of a convert to Christianity, and had been invited to Paris by Artus de Lionne, bishop of Rosalie. Hoang settled there, married, and obtained a modest but sufficient living as translator of Chinese books at the Bibliothèque du roi. Since he died in 1716, it is evident that the conversations took place during Montesquieu's first stay in Paris. We also know from a statement by Fréret that it was towards the beginning of 1712 that he made 'la connaissance du sieur Arcadio Hoange et la procura au Père Desmolets' (Nagel ii, Introduction, p.xxviii). A portion of the diary kept by Hoang still exists at the Bibliothèque nationale and this records the visits he received, including particularly those of Fréret and Desmolets. Unfortunately this fragment starts on 30 October 1713, just before Montesquieu returned to Bordeaux on the death of his father, so there is no record by Hoang of the conversations with Montesquieu. We cannot be certain, but as Desmolets, Fréret, Hoang and Montesquieu were all linked with each other, it seems likely that Fréret introduced his Chinese friend to Montesquieu at about the same time as to Desmolets. Certainly the acquaintance had significant results in the work of both Fréret and Montesquieu. There are records of many contributions on Chinese matters made by Fréret to the Académie des inscriptions, while Montesquieu used the conversations as one of his sources for the *Lettres persanes* and later, in *De l'esprit des lois*, he frequently draws on China for illustrations of his theories. There is little reason to suppose that Montesquieu was influenced by Fréret, but they shared this interest at least, and Montesquieu might have echoed Fréret's words to the Académie des inscriptions (*Œuvres*, vi.277-78);

> Les Chinois forment aujourd'hui la plus ancienne monarchie de l'univers: ils ont cultivé les sciences dès les premiers temps, et subsistent au moins depuis 4000 ans avec les mêmes lois, les mêmes mœurs et les mêmes usages. Ils ne méritent pas moins notre curiosité que les Grecs, les Latins, et les Arabes, commentateurs d'Aristote, dont on

noted in his lifetime chiefly for his erudition and his intolerance of any disagreement, was responsible for antireligious works, published seventeen years after his death and attributed to him, namely the *Examen critique des apologistes de la religion chrétienne* and the *Lettre de Thrasybule à Leucippe*.

[18] Unpublished Ms at La Brède. Extracts in Nagel ii.924-63. An earlier Ms version has been discovered by m. Desgraves at the Bibliothèque municipale at Bordeaux. See L. Desgraves, 'Notes de Montesquieu sur la Chine', *Revue historique de Bordeaux* (1958), pp.200-19.

enseigne la philosophie dans nos écoles, ne fut-ce que pour comparer leurs diverses opinions.

In 1713 Montesquieu's life changed when he returned to Bordeaux on the death of his father. From 1716, while he continued to practise law, his academic career began to develop in a new way. He had lost for a time the stimulus of Parisian literary circles but he was able to pursue both scientific and philosophical studies as a member of the Academy of Bordeaux.

The Académie des sciences de Bordeaux was the oldest established institution of its kind after those of Caen and Paris, but it was still very new when Montesquieu became a member. It was founded in 1712 and the register shows that on 18 April 1716, 'M. de la Brède a été installé dans la place d'académicien ordinaire. Il a fait un remerciement à la Compagnie auquel M. Sarrau, directeur, a répondu.'[19]

This 'discours de réception' and Montesquieu's other extant contributions to the Academy are published in the third volume of the Nagel edition of Montesquieu's works and in the first volume of the Pléiade edition.

M. Xavier Védère in his introduction to the *Œuvres diverses* tells us that (Nagel iii.3)

> L'Académie de Bordeaux était, à ses débuts, une ruche scientifique où la plupart des membres, Montesquieu compris, lisaient avec passion le *Journal des Savants* et le *Mercure de France*; en discutaient les problèmes et les solutions proposées; les portaient à l'ordre du jour de leurs séances ou les livraient au public savant comme sujets de concours. Ce n'est pas Montesquieu qui fit naître, comme certains l'ont cru, cette curiosité scientifique, elle existait avant lui; les archives de l'Académie et les manuscrits de son ami Joseph de Navarre, son aîné à l'Académie, sont là pour en témoigner. Mais il y apporta avec zèle le ferment de sa propre curiosité, le concours actif de sa pénétrante intelligence et y prit bientôt une place prépondérante.

The 'discours de réception' is a polished production of the usual type. Montesquieu had his experience of Paris and was no doubt becoming a well known figure locally, but he had not yet produced anything of note. He says truly: 'Je me trouve parmi vous, messieurs, moi qui n'ai rien qui puisse m'en approcher, que quelque attachement pour l'étude et quelque goût pour les belles-lettres' (Nagel iii.34, Pléiade i.3).

Shortly after his reception, he made his first contribution to the Academy on 18 June, 1716, when he read his *Dissertation sur la politique des Romains dans la religion*. Professor Shackleton suggests that this dissertation shows the influence of Fréret (*Montesquieu*, p.22); perhaps it would be more exact to say that it shows the influence of the literary circles of Paris. In it the religions of the ancient world, particularly of Rome, are treated as purely political, or in modern vocabulary, social phenomena. The first paragraph sets the theme: 'Ce ne fut ni la crainte ni la piété qui établit la religion chez les Romains; mais la nécessité où sont toutes les sociétés d'en avoir une. Les premiers rois ne furent pas moins attentifs à régler le culte et les cérémonies qu'à donner des lois et bâtir des murailles' (Nagel iii.38; Pléiade i.81). Montesquieu argues that the rulers – kings, magistrates, generals – used religious practices, including signs and oracles, to

[19] Nagel iii.33 (not in Pléiade).

obtain support for the course of action they desired, and he shows how the Romans assimilated the cults of other peoples merely by re-naming their deities. He concludes with some disdain: 'Les Romains, qui n'avaient proprement d'autre divinité qwue le génie de la République, ne faisaient point d'attention au désordre et à la confusion qu'ils jetaient dans la mythologie: la crédulité des peuples, qui est toujours au-dessus du ridicule et de l'extravagant, réparait tout' (Nagel iii.50; Pléiade i.92).

The Academy must have been impressed by this dissertation because it was read again at the public session held on 26 August 1716. After this, and while probably also engaged in secret in the preparation of the *Lettres persanes*, Montesquieu took an active interest in the mainly scientific investigations fostered by the Academy.

On 15 November 1717, as director for the year, he gave the 'Discours prononcé à la rentrée de l'Académie de Bordeaux'. An extract shows the strong bias to the sciences (Nagel iii.52; Pléiade i.6):

> Les sciences les plus abstraites sont l'objet de l'académie; elle embrasse cet infini qui se rencontre partout dans la physique et l'astronomie; elle s'attache à l'intelligence des courbes, réservée jusqu'ici à la suprême intelligence; elle entre dans le dédale de l'anatomie et les mystères de la chimie; elle réforme les erreurs de la médecine, cette Parque cruelle qui tranche tant de jours, cette science en même temps si étendue et si bornée; on y attaque enfin la vérité par l'endroit le plus fort, et on la cherche dans les ténèbres les plus épaisses où elle puisse se retirer.

It is interesting to see that he takes some pains to combat a feeling of provincialism: 'Qu'on se défasse surtout de ce préjugé, que la province n'est point en état de perfectionner les sciences, et que ce n'est que dans les capitales que les académies peuvent fleurir' (Nagel iii.54; Pléiade i.8).

These are brave and no doubt honest sentiments, but Montesquieu's later career shows that, while he always cherished his links with the Academy and society of Bordeaux, he frequently visited the capital for long periods and took an active part in its social and intellectual life. Like many other Frenchmen he combined provincial and Parisian life, but Paris was the indispensable setting for his fame.

Apart from an *Eloge de la sincérité*, an essay which was probably composed as a set subject for the Academy and which is little but an exercise in elegant writing, it seems that from now until 1721 he continued to concentrate, so far as the Academy was concerned, on scientific studies. There survive a number of short *résomptions* of the contributions of other academicians. These *résomptions* are often more in the nature of commentaries and take up only one or two paragraphs.

He also undertook some independent work. On 1 May 1718 he read a *Discours sur la cause de l'écho*. This again was a subject set by the Academy and the treatment is rather more literary than scientific. Then on 25 May 1718, he read a report concerning the entries on the subject set by the Academy for that year's prize: *L'Usage des glandes rénales ou capsules atrabiliaires*. It seems that the entries contradicted each other and the prize was not awarded, but he has this very pertinent consolation to offer: 'Par les expériences et les dissections qu'elle [l'Académie] a fait faire sous les yeux, elle a connu la difficulté dans toute son

étendue, et elle a appris à ne point s'étonner de voir que son objet n'ait pas été rempli. Le hasard fera peut-être quelque jour ce que tous ses soins n'ont pu faire' (Nagel iii.83; Pléiade i.19-20). In 1719 he planned, either personally or on behalf of the Academy, a much more ambitious project. He placed in the *Mercure* and in the *Journal des savants* an advertisement beginning: 'On travaille à Bordeaux à donner au public *l'Histoire de la terre ancienne et moderne* et de tous les changements qui lui sont arrivés . . .' Scholars in all countries were invited to send contributions to him. It seems, however, that the enterprise was not taken very far, and no certain traces of it have survived.

There still exist two more reports by Montesquieu of the entries submitted on subjects set by the Academy. The first report entitled *Discours sur la cause de la pesanteur des corps* was read on 1 May 1719. The second, entitled *Discours sur la transparence des corps* was read on 25 August 1720. These reports, while they give evidence of his ability to grasp scientific arguments, are of little other interest. Montesquieu's life was about to take a new turn with the publication in the spring or early summer of 1721 of the *Lettres persanes*.

One other work of substance survives, however, as evidence of the earnestness with which he devoted himself personally to scientific investigations. This is the *Essai d'observations sur l'histoire naturelle*. It was read to the Academy on 20 November 1721 and recounts experiments undertaken by Montesquieu and his secretary, the abbé Bottereau-Duval, during the previous three years. Professor Shackleton discusses the *Essai* in some detail and traces particularly the influence of Malebranche (*Montesquieu*, pp.24-26). Montesquieu himself, although in accordance with his usual practice he kept the manuscript, was not under any illusions about the value of the *Essai* to his own reputation. Towards the end of it he comments (Nagel iii.117; Pléiade i.43)

> C'est le fruit de l'oisiveté de la campagne. Ceci devait mourir dans le même lieu qui l'a fait naître; mais ceux qui vivent dans une société ont des devoirs à remplir; nous devons compte à la nôtre de nos moindres amusements. Il ne faut point chercher la réputation par ces sortes d'ouvrages, ils ne l'obtiennent ni la méritent; on profite des observations, mais on ne connaît pas l'observateur: aussi, de tous ceux qui sont utiles aux hommes, ce sont peut-être les seuls envers lesquels on peut être ingrat sans injustice.

He might have been less detached if he had not already known that his first published work, the *Lettres persanes*, was a great success and that his reputation was made as an author if not as a scholar. Though the work came out anonymously, the author's name was an open secret, and he soon went on a visit to Paris to enjoy his success. From now on there was no question of provincial obscurity for Montesquieu, and yet, looking back at the years from 1713 to 1721, it seems that they set a pattern for his future career. The Academy of Bordeaux was only part of his life. He practised regularly as a lawyer and indeed continued to do so until he sold the presidency in 1726 and, although he did not greatly enjoy his profession, interest in the theory of law became the decisive influence in his work. In 1716 he inherited, in addition to the office of *président*, considerable property which, added to the estates inherited from his father and brought to him by marriage, made him a substantial land owner. He was in the wine business, from growing the vines to exporting the products. He married in 1715 and became the father of a son born in 1716 and two daughters

born in 1717 and 1727. It was perhaps because he was so well established in his province that he was able to set the life of Paris in perspective and show so brilliantly in the *Lettres persanes* how it might appear to a cultivated foreigner.[20]

Between the *Essai d'observations* and the year 1726 when Montesquieu, by selling his office of *président*, freed himself from public obligations in Bordeaux, there is evidence of certain other works of scholarship which he composed. Some of these continue his interest in the sciences. On 18 November 1725 he read to the Academy a *Dissertation sur le mouvement relatif*. This survives only in the accounts of others – a *résomption* by the then director of the Academy, Sarrau de Boynet, a brief analysis by Desmolets in the *Nouvelles littéraires* in 1724 and, significantly, a commentary by another friend who had the entrée to Parisian social and literary circles, Dodart.[21] Montesquieu became director of the Academy of Bordeaux towards the end of 1725 and on 15 November read a paper, *Discours sur les motifs qui doivent nous encourager aux sciences*, which is more an academic exercise than a scientific treatise. One other work, which has survived in part from this period, and which is of more interest as marking the direction in which his thoughts were turning, is the *Traité des devoirs*. A first version of this was read to the Academy at a public session on 1 May 1725. It seems that this *Traité* was intended to be an ambitious work on quite a large scale. Parts of it are included in the *Pensées* and other manuscripts, and we also have a contemporary analysis.[22] There seems no doubt that some of the ideas and part of the text were transposed into the *Lois*, and that the work was discontinued because the author became dissatisfied with it as a separate exercise.

Traces of other works of scholarship, or projects for such works, during this early period can be found in the notebooks and in the archives of the Academy of Bordeaux. There is an interesting excursion into economic theory which probably dates from this time – the *Considérations sur les richesses de l'Espagne*. The date when Montesquieu first wrote on the subject is uncertain but may have been about 1724. Like some of the *Traité des devoirs*, a version of this short work eventually found its way into the *Lois*, as Xavier Védère explains (Nagel iii.137):

> Ce petit mémoire est des plus intéressants parce qu'il nous permet de suivre, par quatre étapes successives, la progression de la pensée et de l'expression de Montesquieu. Ce dernier, en effet, écrivit entièrement de sa main un premier brouillon qui porte le titre *De la principale cause de la décadence de l'Espagne*. Ce brouillon, chargé de corrections, fut mis au net par un secrétaire, l'abbé Duval, le titre lui-même fut modifié et devint *Considérations sur les richesses de l'Espagne*. Montesquieu a ensuite tiré de cette mise au net, de nouveau remanié, l'article XVI de ses *Réflexions sur la Monarchie universelle en Europe*. Enfin, une quatrième fois, élargissant encore son point de vue, il a puisé dans son premier texte tout le début du XXIIe chapitre du Livre XXI de *l'Esprit des Lois*.

The history of this piece illustrates its author's capacity for following up his own theories and setting them within his grand design in the *Lois*.

We can now form a picture of Montesquieu's activities as a scholar in these

[20] Compare P. Barrière, *Un grand Provincial: Charles-Louis de Secondat baron de La Brède et de Montesquieu* (Bordeaux 1946) and 'Les éléments personnels et les éléments bordelais dans les *Lettres persanes*', *RhlF* 51 (1951), pp.17-36.

[21] Nagel iii.125-27 (not in Pléiade).

[22] Nagel iii.157-63, and Shackleton, *Montesquieu*, pp.68-76.

early years of his career. After his school education at Juilly, he graduates in law at Bordeaux. In Paris he makes notes on Chinese culture and history. Back in Bordeaux he interests himself in the sciences and undertakes experiments over a period of three years, he practises his career as a magistrate, and he begins some of the enquiries into human relationships and economic causes and effects which will enter into *De l'esprit des lois*.

It is to the *Lettres persanes* rather than to his work for the Academy of Bordeaux that we should look for evidence of his interest in political theory and the institutions of his own country. It does, however, seem permissible to say that his work for the Academy fostered that spirit of enquiry, that habit of weighing evidence, that appreciation of the complexity of causes leading to a particular situation or event, which was to lead him from the swift glances of the *Lettres persanes* to the panoramic view of *De l'esprit des lois*.

After 1721 he spent a good deal of time in Paris. He became again, but at a much higher level than in the years 1709 to 1713, a member of the literary and social world of the capital, and it is evident that his name was becoming known. Yet when he eventually gave up his presidency in Bordeaux in 1726 he had published little. Apart from the *Lettres persanes*, there was only another work of fiction, the *Temple de Gnide*, which was published, again anonymously in 1725. This is a short piece, purporting not very seriously to be a translation from a manuscript in Greek. In the so-called 'Préface du Traducteur', Montesquieu says: 'Ce petit roman est une espèce de tableau où l'on a peint avec choix les objets les plus agréables. Le public y a trouvé des idées riantes, une certaine magnificence dans les descriptions, et de la naïveté dans les sentiments' (Nagel iC.565; Pléiade i.387). Perhaps as a relief from the gloomy and tragic passions portrayed in the closing section of the *Lettres persanes*, the author shows, in the *Temple de Gnide*, a picture of sexual desire in a setting of pastoral beauty and simplicity reigned over by the goddess Venus. The young men and women at Gnide are described repeatedly as open, tender, full of sentiment, delicacy and natural feeling. The contrast with the picture of the Persian harem, with its absent but tyrannic master, its repressed women and sadistic eunuchs, would be complete except that in the *Temple de Gnide*, as in the *Lettres persanes*, Montesquieu knows how to arouse and direct the erotic fancies of his readers without going so far as to indulge in explicit descriptions.

We can judge of the effect of the new work by the letter Desmolets wrote to Montesquieu on 23 April 1725 (*Correspondance*, Nagel iii.788).

> La cour est fort charmée de votre ouvrage, mais les savants ne sont pas contents que vous ayez donné cela pour une pièce grecque et pour un poème; d'autres m'ont dit que cela était très-spirituel, que cela ferait honneur à un jeune homme, mais que si la pièce était de ceux à qui on l'attribuait, qu'elle était beaucoup au'dessous d'eux, que cela ne valait pas les *Lettres persanes*. Des uns disent qu'on sent partout un jeune débauché, d'autres que c'est un vieux routier en fait de débauche qui a composé cet ouvrage qui renferme, selon eux, les plus grandes obscénités, surtout dans la dernière pièce. Enfin, j'ai vu des lettres de Bordeaux dans lesquelles on assure que vous êtes auteur de cet ouvrage. Je vous dis tout ce que j'entends dire, sans rien déguiser, afin que vous preniez vos mesures là-dessus et que vous puissiez ou vous cacher ou vous découvrir selon que vous jugerez plus à propos.

The 'savants', it appears, were not impressed by the *Temple de Gnide*, and it is clear that in 1727, when the thoughts of Montesquieu and his friends turned towards his candidature for the Académie française, his fame with the general educated public rested principally not on his achievements over the past ten years as a scholar and a lawyer, and not on his most recently published work, but on his brilliant and irreverent work of fiction and social comment, the *Lettres persanes*. That this should be so was an embarrassing fact. Montesquieu had given amusement and some cause for reflection to a great number of readers in France and other countries, and in doing so he certainly held up to ridicule many established institutions and punctured the self-esteem of many people of consequence. It is understandable that the members of the Académie française had certain reservations when, on the death of Louis de Sacy on 26 October 1727, a vacancy occurred in their numbers and Montesquieu became a candidate. M. Louis Desgraves has told the story and it is interesting to look at the various events which illustrate Montesquieu's position in the learned society of his time.

M. Desgraves indicates first the difficulties of the candidature:

> Membre de l'académie royale des sciences, belles-lettres et arts de Bordeaux depuis 1716, auteur des *Lettres persanes* et du *Temple de Gnide*, Montesquieu ne pouvait, malgré son attitude frondeuse, rester insensible à l'attrait et au prestige exercés sur tous les esprits éclairés par l'Académie française. Emporté par la fougue de sa jeunesse et par son tempérament gascon, il n'avait cependant pas épargné ses sarcasmes à l'illustre compagnie. Les échos de la LXXIIIe *Lettre persane* ne s'étaient pas encore éteints lorsque poussé par ses amis parisiens il conçut, à l'âge de trente-neuf ans, l'ambition de solliciter les suffrages de ces écrivains dont il avait tracé un portrait peu flatteur.[23]

The *Lettres persanes*, as we have seen, had appeared in 1721, and the name of the author was an open secret, even though the work had been published anonymously. Situations of this sort were not uncommon in those days, when the anxiety of men of letters to avoid the inconvenience and perhaps danger of state censorship, was matched by the anxiety of ministers to avoid an open breach with the scholars and their powerful supporters.

The unflattering portrait of the Academy in a letter from Rica to Usbek, dated 1715 from Paris, begins:

> J'ai ouï parler d'une espèce de tribunal qu'on appelle *l'Académie française*. Il n'y en a point de moins respecté dans le Monde: car on dit qu'aussitôt qu'il a décidé, le Peuple casse ses arrêts et lui impose des lois qu'il est obligé de suivre.
>
> Il y a quelque temps que, pour fixer son autorité, il donna un code de ses jugements. Cet enfant de tant de pères était presque vieux quand il naquit, et quoiqu'il fut légitime, un bâtard, qui avait déjà paru, l'avait presque étouffé dans sa naissance.[24]

The Academy of course was the official guardian of the French language and the allusion in this letter is to the *Dictionnaire* published under its auspices. The first edition of this appeared in 1694, four years after the *Dictionnaire universel* of Furetière. Since Furetière was a member of the Academy, but published his *Dictionnaire* without its approval, his work could be regarded as 'illegitimate'.

[23] L. Desgraves, 'Montesquieu et l'Académie française', *Revue historique de Bordeaux* (1957), pp.201-17.

[24] *L.P.* 73, Nagel iC.152; Pléiade i.242.

Montesquieu was now a candidate for membership of this same body and it is hardly surprising that some of the existing members had reservations. However, the candidate formed part of the circle of madame de Lambert, extremely influential in literary circles, and she, with the other members of what their adversaries called 'le clan Lambertin' were determined that he should succeed.

The ironical wit of the *Lettres persanes* was directed at many targets in addition to the Académie française. Church and king were certainly not spared. In letter 24 for example, the two are attacked together (Nagel iC.51-52 Pléiade i.165-66)

Le Roi de France est le plus puissant prince de l'Europe. Il n'a point de mines d'or comme le roi d'Espagne, son voisin; mais il a plus de richesses que lui, parce qu'il les tire de la vanité de ses sujets, plus inépuisable que les mines. On lui a vu entreprendre ou soutenir de grandes guerres, n'ayant d'autres fonds que des titres d'honneur à vendre, et, par un prodige de l'orgueil humain, ses troupes se trouvaient payées, ses places, munies, et ses flottes, équipées.

D'ailleurs ce roi est un grand magicien: il exerce son empire sur l'esprit même de ses sujets; il les fait penser comme il veut. S'il n'a qu'un million d'écus dans son trésor, et qu'il en ait besoin de deux, il n'a qu'à leur persuader qu'un écu en vaut deux, et ils le croient. S'il a une guerre difficile à soutenir, et qu'il n'ait point d'argent, il n'a qu'à leur mettre dans la tête qu'un morceau de papier est de l'argent, et ils en sont aussitôt convaincus. Il va même jusqu'à leur faire croire qu'il les guérit de toutes sortes de maux en les touchant, tant est grande la force et la puissance qu'il a sur les esprits.

Ce que je te dis de ce prince ne doit pas t'étonner: il y a un autre magicien plus fort que lui, qui n'est pas moins maître de son esprit qu'il l'est lui-même de celui des autres. Ce magicien s'appelle *le Pape*. Tantôt il fait croire que trois ne sont qu'un, que le pain qu'on mange n'est pas du pain, ou que le vin qu'on boit n'est pas du vin, et mille autres choses de cette espèce.

This is heady stuff, and there is a great deal more like it, dangerous in a country where the king still personified the state, and the state still accepted only one official religion, the Holy Catholic Church. Elections to the Academy, though made by the members themselves, had to be approved by the king. The technique employed by Montesquieu's opponents was to persuade the king's minister, cardinal Fleury, that the author of the *Lettres persanes* was not suitable, because of his dangerous opinions, to be a member of an official body under the king's patronage.

A rival candidate was found in the person of the advocate Mathieu Marais. Desgraves comments:

Les oppositions et les rivalités se cristallisèrent autour de ces deux noms; l'un célèbre, Montesquieu; l'autre connu d'un seul cercle d'initiés. Peu importait d'ailleurs la personnalité de celui qui était opposé à Montesquieu. Cette candidature n'avait qu'un but, faire échec à l'auteur des *Lettres persanes* et, à travers sa personne, au parti philosophique groupé autour de la marquise de Lambert.[25]

The intrigue can be followed in the diary and correspondence of the rival candidate, Mathieu Marais. It appears that pressure was put on Montesquieu to disown the *Lettres persanes* and yet, even if he had been prepared to comply, the work was his chief claim to fame. Marais says: 'On lui dit "Si vous avez fait

[25] Desgraves, *Montesquieu et l'Académie française*, p.204.

les *Lettres persanes*, il y a une contre le corps de l'Académie et ses membres. Si vous ne les avez pas faites, qu'avez-vous fait?"'[26]

Whatever may have been said, it seems that Montesquieu continued to be the favourite, although he did not disown his work, and cardinal Fleury gave no indication of royal disapproval. Then the well-known Jesuit priest, le père Tournemine, editor of the influential *Journal de Trévoux*, who was at odds with Montesquieu, arranged for extracts from the *Lettres persanes*, no doubt those which were most shocking, expecially when read out of context, to be brought to the attention of the cardinal. The latter was upset, as intended, and wrote to the maréchal d'Estrées, the current director of the Academy, requesting a formal disavowal to be read aloud to the Academy, or else that Montesquieu should withdraw. This request reached the maréchal d'Estrées just before the first election day (the election was in two parts). The director probably knew that the author was unlikely to make any formal disavowal, and was anxious to avoid an open split in the ranks of the Academy or between the Academy and the king. He may also have appreciated that Montesquieu, in spite of his offences against established institutions, was much more likely to bring lustre to the Academy than Mathieu Marais. At any rate he played for time and the first election was postponed from 11 December to 20 December 1727. Meanwhile Fleury met Montesquieu personally to discuss his candidature.

Desgraves follows Elie Carcassonne[27] in discounting entirely Voltaire's story that Montesquieu produced a special expurgated edition of the *Lettres persanes* for the benefit of the cardinal. He may however have given assurances and apologies in private, which he could not give in public. Luckily the minister realised that a brilliant and successful man must not be pushed too far. On 5 December 1727 Fleury wrote to the abbé Dubos, perpetual secretary to the Academy, saying:

> Il y a de certaines choses qu'il vaut mieux ne pas approfondir par les suites qu'elles pourraient avoir, et si on voulait aller trop loin, on n'en dirait pas assez ou en dirait trop.
>
> La soumission de M. le président de Montesquieu a été si entière qu'il ne mérite pas qu'on laisse aucun vestige de ce qui pourrait porter préjudice à sa réputation, et tout le monde est si instruit de ce qui s'est passé, qu'il n'y a aucun inconvénient à craindre du silence que gardera l'Académie. Je ne puis m'empêcher de penser que le parti de prévenir des tracasseries est toujours le plus prudent. Voilà mon sentiment et je ne prétends vous le donner pour une décision. Je serais bien fâché de vouloir m'ériger en juge de ce que pourra faire la compagnie.[28]

The election on 20 December duly went in Montesquieu's favour and was confirmed on 5 January 1728, though not by a unanimous vote. The abbé Dubos was present on this occasion and it may be wondered whether memories of the election intrigue influenced Montesquieu, even unconsciously, when he castigated Dubos's *Histoire critique* in Book xxx of the *Lois*. This however can

[26] Marais to the président Bouhier, 24 Nov. 1727, in Mathieu Marais, *Journal et mémoires* (Paris 1863-1868), iii.501.

[27] In edition of *Lettres persanes* (Paris 1921), i.16.

[28] Quoted by Desgraves who gives as reference 'Lettre citée par Brunel (L), *Les Philosophes et l'Académie française au dix-huitième siècle*, Paris 1884, p.14.'

only be subject for speculation since no letter or note survives recording the feelings of the candidate on the matter.

Although membership of the Académie française set the seal of official approval on Montesquieu's reputation as not just the author of one brilliant satirical book but as a serious philosopher and writer, the members of this forum did not devote themselves as a body to matters of historical research. They were at the time preparing a new edition of the *Dictionnaire*. Historical research was the province of another body, the Académie des inscriptions et belles lettres. Montesquieu did not belong to this Academy and its seems unlikely that the specialist nature of its deliberations would have appealed to him. He was already thirty-nine years old when he was elected to the Académie française and very shortly afterwards he departed for his rather belated grand tour of Europe. During the next three years he met many people and observed and studied in the most general way possible as he recounts in the *Voyages*.

The tour ended with a prolonged stay in England from November 1729 to the spring of 1731. During this time he was elected to the Royal Society. That he should have received this honour, in addition to membership of the Académie française, implies that he was indeed recognised as a scholar of note by contemporaries of the same standing. Though he had published little he had composed many memoirs and dissertations (those presented to the Academy of Bordeaux represent only a part of his output) and it seems likely that these were known to at least some of his friends and acquaintances. Moreover, the *Pensées*, the *Spicilège*, the *Voyages*, and the *Geographica* are witnesses to the eager intelligence and insatiable curiosity with which he conversed and read and made notes on all manner of subjects. To those who knew him at all well the effect must have been very striking. All this, added to the considerable literary achievement of his *Lettres persanes* was sufficient to make his reputation.

He was not, however, at all inclined to settle now for an easy life. It seems appropriate at this point to mention the *Considérations sur les causes de la grandeur des Romains et de leur décadence*, published in 1734, because Montesquieu presented copies to the Académie française and the Royal Society, and it is likely that part of his motivation in concentrating on this, his first full length completed serious work, was a desire to justify his standing with these two august bodies. In connection with the present study the *Considérations* is of particular interest since it is, of all Montesquieu's work, that which is most obviously akin to the three historical books of the *Lois*.

In both cases the avowed aims are very similar. In the *Considérations* there is a line of demonstration showing how and why the Romans rose to their preeminence in the world and then declined. Similarly, at the end of the *Lois*, Montesquieu shows how and why the civil law of France developed as it did, how and why the sovereign power shifted between the monarchy and the feudal lords. The purpose is not the straightforward relation of events, but to present an analysis and a commentary based on events.

Certain differences in treatment arise, partly from the subject matter and partly no doubt from Montesquieu's own development as a scholar. Knowledge of Roman history could be taken for granted amongst educated people. Voltaire

calls the subject of the *Considérations* 'matière usée'.[29] Montesquieu was very well read in the history of Rome and the Roman Empire but, if he did indeed compare the authors and their accounts, and he may well have done so, he does not indicate this in the text. A recent edition of the *Considérations* (Paris 1968) has a preface by Jean Ehrard which is very enlightening and takes a little further the commentary to the 1906 edition by Camille Jullian, 'qui reste le plus éclairé' of Montesquieu's commentators, according to Jean Ehrard. The latter draws attention to Montesquieu's failure to compare his sources or to make any allusion to the work of contemporary scholars:

> il ignore tout, semble-t-il des travaux et discussions de son époque. Pour évoquer les premiers temps de l'histoire romaine, il préfère l'autorité de Denys d'Halicarnasse à celle de Tite-Live: choix arbitraire ou simple coquetterie sans conséquence puisqu'il ne conçoit pas le moindre doute quant au héros éponyme de Latium ni à la suite traditionnelle des sept rois de Rome. Dès 1723, Lévesque de Pouilly avait cependant discuté celle-ci devant ses confrères de l'Académie des inscriptions. Montesquieu traite des origines de Rome avec une tranquille assurance: le débat ouvert dix ans plus tôt ne l'intéresse pas. Lorsqu'il rééditera son livre (1748) il ne tiendra pas davantage compte de la remarquable leçon de doute méthodique donnée en 1738 par Louis de Beaufort dans sa *Dissertation sur l'incertitude des cinq premiers siècles de l'histoire romaine*. Seul son rationalisme de philosophe, et non une saine méthode historique, lui évite finalement d'être aussi crédule que Rollin,[30] et de mériter autant que lui les railleries de Voltaire.

Despite all this, the *Considérations* is not an unimportant work. We know that Montesquieu, on his return from England in 1731, and after a brief visit to Paris, returned to La Brède and worked solidly for two years, probably unaided, to produce his book. Professor Shackleton has an interesting paragraph on his documentation (*Montesquieu*, p.153):

> The *Spicilège*[31] contains a list of books on the later Roman Empire which Montesquieu says he has already read. It is a severe list: Jornandes, Procopius, Agathias, Paulus Diaconus, Flavius Blondus. But it represents only a fraction of all the reading which Montesquieu undertook in his study of Rome. It was his practice to make extracts or synopses of books which he had read, and the accident of mention in the *Pensées* or elsewhere, discloses that he had made extracts from Herodotus, Strabo, Pomponius Mela, Ammianus Marcellinus, Constantine Porphyrogenitus, Plutarch, Procopius, Cassiodorus, Justinus, Polybius, Philostrates, Lilius Giraldus, Aulus Gellius, and Livy. Nor can this list be regarded as complete – Sallust, Suetonius, and above all Tacitus, were well known to Montesquieu, and he was acquainted with many of the obscurer Byzantine authors.

A glance at the *Considérations* enables us to add other names to this list, e.g. Cicero and Caesar, to take only the most obvious.

Camille Jullian showed that in each chapter Montesquieu follows just one or two authorities. The choice appears arbitrary, but one wonders whether it was so. Montesquieu writes with a serene authority, in a lucid and elegant but magisteral prose. Let us look at just one passage taken from the heart of the book, chapter 9 'Deux causes de la perte de Rome' (*Considérations*, Nagel iC.412-14; Pléiade ii,117-18):

[29] *Catalogue des écrivains du siècle de Louis XIV*, in Voltaire, *Œuvres* (Dijon 1962), ii.1187.
[30] Charles Rollin, *Histoire romaine* (Paris 1738-1741).
[31] *Spicilège* 561 (Ms. p.521), Nagel ii.848; Pléiade ii.1369.

Rome avait soumis tout l'univers, avec le secours des peuples d'Italie, auxquels elle avait donné, en différent temps, divers privilèges (a). La plupart de ces peuples ne s'étaient pas d'abord fort souciés du droit de bourgeoisie chez les Romains; et quelques uns aimèrent mieux garder leurs usages (b). Mais lorsque ce droit fut celui de la souveraineté universelle, qu'on ne fut rien dans le monde si l'on n'était citoyen romain, et qu'avec ce titre on était tout, les peuples d'Italie résolurent de périr ou d'être Romains: ne pouvant en venir à bout par leurs brigues et par leurs prières, ils prirent la voie des armes; ils se révoltèrent dans tout ce côté qui regarde la mer Ionienne; les autres alliés allaient les suivre (c). Rome, obligée de combattre contre ceux qui étaient, pour ainsi dire, les mains avec lesquelles elle enchaînait l'univers, était perdue; elle allait être réduite à ses murailles: elle accorda ce droit tant désiré aux alliés qui n'avaient pas encore cessé d'être fidèles (d); et peu à peu elle l'accorda à tous.

Pour lors, Rome ne fut plus cette ville dont le peuple n'avait eu qu'un même esprit, un même amour pour la liberté, une même haine pour la tyrannie; où cette jalousie du pouvoir du sénat et des prérogatives des grands, toujours mêlés de respect, n'était qu'un amour de l'égalité. Les peuples d'Italie étant devenus ses citoyens, chaque ville y apporta son génie, ses intérêts particuliers, et sa dépendance de quelque grand protecteur (e). La ville déchirée ne forma plus un tout ensemble: et comme on n'en était citoyen que par une espèce de fiction; qu'on n'avait plus les mêmes magistrats, les mêmes murailles, les mêmes dieux, les mêmes temples, les mêmes sépultures, on ne vit plus Rome des mêmes yeux, on n'eut plus le même amour pour la patrie, et les sentiments romains ne furent plus.

Notes: (a) *Jus latii, jus italicum.*

(b) Les Eques disaient, dans leurs assemblées: 'Ceux qui ont pu choisir ont préféré leurs lois au droit de la cité romaine, qui a été une peine nécessaire pour ceux qui n'ont pu s'en défendre.' Tite-Live, liv. IX, ch.XLV.

(c) Les Asculans, les Marses, les Vestins, les Marrucins, les Férantans, Les Hirpins, les Pompéians, les Vénusiens, les Japyges, les Lucaniens, les Samnites at autres. Appien, *De la guerre civile*, liv.I, ch.xxxix.

(d) Les Toscans, les Ombriens, les Latins. Cela porta quelques peuples à se soumettre; et, comme on les fit aussi citoyens, d'autres posèrent encore les armes; et enfin il ne resta que les Samnites, qui furent exterminés.

(e) Qu'on s'imagine cette tête monstrueuse des peuples d'Italie, qui, par le suffrage de chaque homme, conduisait le reste du monde.

Camille Jullian's study showed that Montesquieu is following Ammianus Marcellinus and Florus, and he himself refers, as we have seen, in footnotes to the Roman historian Livy and the Greek historian Appian. We cannot doubt, however, that this passage represents his own view of the critical development he is describing. We simply do not know how many authorities he compared before arriving at that view – the references are used as illustrations rather than authorities. It may indeed be the case that he was unaware of contemporary historical investigations and was arbitrary in his choice of references, but it may also be the case that he was aware of these investigations, and of the variety of evidence available, considered the matter, and then expressed his own view of events. It is the fault of the *Considérations* that we are unable to judge where the truth may lie between these two possibilities. We can say, however, that the work is much more than a narrative. It is a view of the historical process and an exercise in political and moral judgement which is constantly brought alive and made relevant by comparison with other periods, other people, and other parts of the world.

It was after the *Considérations* that Montesquieu turned definitely to the composition of *De l'esprit des lois*. Looking back at the perspective of his development as a scholar, we can see that some interesting new enterprise might be expected. By education and by his early career he belonged to the law; he was interested in scientific research and had personally undertaken some investigation; the *Lettres persanes* brought him fame both as a writer and as a witty critic of society. Election to the Adadémie française expressed the learned world's acceptance of him in his own country, and this acceptance was also confirmed during his travels by election to the Royal Society. Subsequently, he gave proof of his continuing devotion to learning, by spending some two years almost entirely in seclusion at La Brède in order to produce the *Considérations*. He was distinguished from the great majority of the 'savants' by being as much a man of literature as of learning. By this time he had developed his mature style of writing – assured, never diffuse, often brilliant, sometimes gravely noble. What would he do next?

Nobody, except Montesquieu himself, could have foreseen *De l'esprit des lois*. The subject matter is on a scale to daunt the imagination – it is nothing less than a comprehensive survey of the types of civil and constitutional law in their relationship to the individuals and societies which have produced and are governed by them, as well as the influence of many factors, including the natural environment, in the total process. Montesquieu himself wrote in the preface to the *Lois*: 'J'ai bien des fois commencé, et bien des fois abandonné cet ouvrage'. All the onlooker can say is that, judging by the progress of his career up to this point, it was not likely that the *Considérations* would be his last or his finest production. His intelligence and curiosity, his habits of constant reading and note-taking, his experience of writing, and also the reputation which, once acquired, spurs a man to stretch his powers still further, all favoured the probability that his best work was still to come. It seems legitimate to add that, at some point in his career, Montesquieu would probably want to build on the grounding in French history he had received at Juilly and the knowledge of French law he had acquired in the University and the courts of Bordeaux.

Apart from the *Lois*, there are some records of his interest in French history. Long fragments entitled 'Morceaux de ce que je voulais écrire sur l'histoire de France' are in the *Pensées* (Nagel ii.360-94; Pléiade i.1094-1125). Just a few paragraphs deal with the Merovingian and Carolingian periods, and most of the work relates to the following period. Presumably the intention was to bring the story up to date as the last few paragraphs concern the Regency. Some of the ideas in the *Lois* appear in these fragments but are not developed. It is apparent also that Montesquieu composed a history of Louis XI which was accidentally burned.[32]

As he came to concentrate on the *Lois*, however, such projects were put aside. He turned instead, so far as the history of France was concerned, to that aspect of the subject, the development of its laws, which fitted the grand design. As we know, he deferred the actual writing of the three historical books of the *Lois*

[32] *Correspondance*, Montesquieu to Guasco, 19.10.1747, and note by Guasco, Nagel iii.1097.

until 1747 to 1748, some thirteen years after the publication of the *Considérations*. The advance, in terms of historical method, is very striking. It must be remembered that there was no question of 'matière usée'; in fact much of the material would have been known, before Montesquieu wrote, by a few specialist scholars only. He makes comparisons between texts, gives detailed references and argues disputed conclusions. He shows that he is aware of the work of contemporary historians, and his references indicate, as we shall see, the value and variety of his sources.

The haste with which Books XXVIII, XXX and XXXI of the *Lois* were finally composed is apparent. The *Considérations* is a much more elegant and finished piece of writing. Nevertheless the three books are worthy of Montesquieu as a scholar. As we examine his documentation and his theories in the next chapters, we shall come to a better appreciation of the research he carried out in the field of French civil and constitutional law and the historical insight he brought to his subject.

5. Books and libraries

MONTESQUIEU took considerable pains in the historical books to support his theories by references to particular events, laws, charters and so on and to explain how his own views of the historical process agreed with or differed from those of his predecessors. He names the sources he uses, frequently giving precise references to volumes, chapters and sometimes pages. This enables his documentation to be traced with a high degree of accuracy, even usually to the edition used where more than one were possible.

Mademoiselle Françoise Weil has published a list of all the books she can trace as mentioned by Montesquieu in his works, and in addition she has identified, where possible, the library from which Montesquieu probably obtained each book.[1] For Books XXVIII, XXX and XXXI of the *Lois* she identifies about forty works and suggests a library for most of them. The notes by Jean Brethe de La Gressaye in the critical edition of the *Lois* (tome iv, 1961) are another invaluable source of information concerning the sources used in Books XXVIII, XXX and XXXI. In this chapter I am very much indebted to these two scholars for their work in this field. With further research, I have been lucky enough to fill up most of the gaps in their work, so that in what follows nearly all the sources mentioned by Montesquieu are identified and traced to the libraries from which he probably obtained them. As we have already said, some fifty works are involved but some of these, particularly the big 'recueils' by Duchesne and Dom Bouquet include a great number of separate items.

Montesquieu had the habit all his life of making notes and extracts from books, newspapers, magazines etc. which interested him. No doubt there was a double process at work. He was influenced by what he read, but also spurred on by it to pursue certain independent lines of thought. It is our misfortune that most of the notes and extracts he made are lost, probably for ever. The story is told in the preface to tome ii of the Nagel edition of Montesquieu's works. In 1818 after the vicissitudes of the Revolution and the Restoration, 8 cartons of manuscripts, plus the three volumes of the *Pensées* were sent to Charles-Louis de Montesquieu, grandson of the *Président*, then living at Bridge Hall in England. Only the *Pensées*, the *Spicilège*, the *Voyages* and one carton came back. The catalogue of all the manuscripts sent to London was kept at La Brède and is printed in the Nagel edition, tome iii, page 1575. It is in a very summary form and we can only speculate on what was contained, for example, in the seventh carton, described in the catalogue as 'Résidu important de l'Esprit des lois, dont il faut achever l'examen'. The carton included 27 'cahiers'. How much we should like to know the contents. Just a few titles are an indication of what has been lost:

Establissement des barbares en divers pays;

de Muratori, sur l'advocatus de parte publica, qui ont rapport à ce que j'ai dit au livre

[1] F. Weil, 'Les lectures de Montesquieu', *RhlF* 57 (1957), pp.494-514.

28 sur la manière dont on punissait les crimes sous la 2ème race, que je garde en cas qu'il faille discuter plus avant;

mes livres des Fiefs;

quelques lois remarquables.

If we had these lost notebooks before us, we might be able to say precisely when he consulted the various works he mentions. However, without the notebooks, the internal evidence shows that he acquired or borrowed a number of the works specifically to enlarge his information and bring it up to date for the composition of the historical books. Also, it seems likely that when he came to write these books he read again many works which he had probably seen years before and obtained new information from them as well as verifying earlier impressions.

Except during the years of travel abroad, the two centres of Montesquieu's life were at Bordeaux and Paris. He possessed a good library at his principal residence near Bordeaux, the chateau of La Brède. The Academy of Bordeaux also had a library and members could consult and borrow the books. There were other Bordeaux men of letters with their own excellent collections of books, notably Montesquieu's lifelong friend and colleague the *président* Barbot. Many of the works mentioned in the historical books were in one of these three collections. Montesquieu had another library of his own at his other centre, Paris and he also of course could consult in Paris the Bibliothèque du roi. There were a number of other private collections but the one most accessible to him was probably that of the Oratorians whose librarian, le père Desmolets, was his friend and correspondent. Several works which are mentioned in the historical books but which were not in one of three Bordeaux libraries, were available in the Oratorian library.

Before giving the titles of the works mentioned by Montesquieu, and the likely provenance, let us see what is known about these libraries as they existed more than two centuries ago. It so happens that in most cases quite a lot is known about them.

If we look first at the library of La Brède we find that by great good fortune the catalogue, as it existed in Montesquieu's own lifetime, has survived and can be consulted in the edition by m. Louis Desgraves.[2] The catalogue contains 3,236 titles. In his introduction m. Desgraves discusses the various vicissitudes through which the library has passed. Some of its contents still remain at La Brède, but in any case the catalogue shows us how extensive was the collection of works Montesquieu possessed in his own home. In his review of the published edition of the catalogue, H. Roddier traces Oratorian principles in the formation of the collection:

Trois principes sélectifs semblent avoir inspiré ses achats. Il [Montesquieu] s'efforce de se procurer soit la première édition d'un ouvrage, la plus pure, la moins corrompue (par exemple, les *Institutions* de Calvin, de 1536), soit la plus récente pour les livres revus et augmentés (certains figurent ainsi en plusieurs éditions), soit enfin les textes originaux concurramment avec les traductions pour les livres latines et italiennes, ou anglaises à partir de 1729. Il se conforme ainsi aux recommendations de ses amis oratoriens, du

[2] *Catalogue de la Bibliothèque de Montesquieu*, publié par Louis Desgraves (Genève, Lille 1954).

père Lamy surtout (*Entretiens sur les sciences*) et du père Desmolets (bibliothécaire de l'Oratoire).[3]

The catalogue was known at the time of the baron Charles de Montesquieu, who lived from 1833 to 1900, and was obliged to sell part of the library at La Brède between 1874 and 1876 in order to raise money. Desgraves quotes from a life of the baron[4] published shortly after his death, to show that Charles de Montesquieu avoided including in the sale those books which had belonged to his famous ancestor: 'Il parvint, en s'aidant du catalogue dressé par les soins du Président et des mentions portées à l'intérieur de ces livres, à réunir plus de trois mille volumes ayant cette précieuse origine'. It seems certain that the catalogue was still available for consultation in 1926, when another sale took place, since the expert librarians employed on that occasion marked on the sale catalogue the works which had belonged to Montesquieu. There was a further sale of manuscripts from La Brède in 1939, but the catalogue was not included and was thought to be lost. In March 1950, however, in one of those moments which every researcher longs for, professor Robert Shackleton found the catalogue still at la Brède.[5] The importance of this find was realised by professor Shackleton and by m. Desgraves, at that time curator of the Bibliothèque municipale at Bordeaux and, as we have seen, publication took place only four years later. I am now following up, in respect of just one aspect of Montesquieu's thought, the further study suggested by m. Desgraves in his preface to the catalogue:

> Ce catalogue offrira à tous ceux qui s'intéressent à l'auteur de l'*Esprit des lois*, une riche matière d'études sur les sources souvent mal connues de ses œuvres, sur les directions dans lesquelles s'est exercée sa curiosité intellectuelle; par lui, il sera peut-être possible de déterminer la part respective des influences qui ont contribué à donner à la pensée de Montesquieu sa forme définitive.

The catalogue becomes even more valuable in the light of the study made by professor Shackleton of the handwriting of Montesquieu and his many secretaries (Nagel ii.xxxv-xliii). The study, combined with other evidence such as dates of publication, entries in the *Pensées* or the *Spicilège*, mentions in correspondence and so on, enables him to assign dates, not with absolute certainty but with a fair degree of confidence, to the entries in the catalogue.

Let us see how far we can go in establishing which of Montesquieu's sources for the historical books were in his library at La Brède and what evidence there is that he acquired some of them personally and that he took pains to keep his documentation up to date.

He came home from Paris to live at La Brède when his father died in November 1713. Probably he inherited the greater part of the library with the château (Shackleton, *Montesquieu*, p.230), but it is likely that he made considerable additions to it. His son certainly thought so. When he describes Montes-

[3] Compte-rendu of the *Catalogue de la Bibliothèque de Montesquieu*, *RhlF* 57 (1957), p.73.

[4] *Charles de Secondat, baron de Montesquieu 1833-1900* (Bordeaux 1900), p.15.

[5] The story is recounted in 'Two unpublished documents' by Robert Shackleton, *French studies* (1950), p.317.

quieu's life during the period 1731-33 he says, no doubt repeating what his father and mother had told him (*Mémoire*, pp.396-407):

> De retour en France, M. de Montesquieu se retira pendant deux ans entiers dans la solitude de la Brède pour achever ce grand ouvrage [this was the *Causes de la grandeur des Romains et de leur décadence*]. Entouré de ses livres dont il avait fait une collection nombreuse, d'abord qu'il avait été maître de son bien, et sans presque se donner d'autres distractions que de percer des routes et des promenades dans des forêts, de donner un nouveau cours aux ruisseaux et de changer en prairies des terrains arides.

Certainly we find that many of the entries in the catalogue can be dated. The greater part is in the handwriting of one person. Professor Shackleton identifies him as the abbé Bottereau-Duval (secretary 'd' in his terminology), who was in Montesquieu's service from 1720/21 to the end of 1731 or the beginning of 1732. It seems likely that he got on with the work of cataloguing while his employer was on his travels from 1728 to the middle of the year 1731 and that he added additional works up to the time he left his service. Consequently, for the entries in Bottereau-Duval's handwriting, we can say with certainty that a work was acquired by Montesquieu personally only if the date of publication was after 1713 or if there if some other positive evidence of the acquisition. The positive evidence exists for eighteen works listed in two booksellers' accounts still preserved at La Brède,[6] but only one of the works listed in the historical books figures in these lists. This is the *Glossarium* of Du Cange. Montesquieu acquired the 1710 edition from la veuve Labottière in 1717, but he later acquired the revised edition of 1733 and the references in the *Lois* are naturally to the revised edition. Montesquieu himself and four of the secretaries employed at a later period also made entries in the catalogue and the final picture is as follows:

63 titles entered by Montesquieu
2992 titles entered by secretary 'd' up to 1731/2
95 titles entered by secretary 'e' from 1731/2 to 1738/9
22 titles entered by secretary 'h' 1740 to 1743
1 title entered by secretary 'i' 1743 to 1746
63 titles entered by secretary 'o' 1746 to 1747

Of the sixty-three titles entered in 1746 to 1747, nine form part of the known documentation of the historical books of the *Lois*, and several others are relevant to themes treated in these books, though they are not specifically mentioned. Eight other works which form a part, sometimes an important part, of the documentation, must also have been acquired by Montesquieu himself, as we know from the dates of publication or from the handwriting in which the entries are made.[7]

[6] La veuve Labottière 3 August 1717, La Court 10-22 May 1722 (L. Desgraves, *Catalogue*, Introduction, p.xv).

[7] See Table 1, pp.82-85. Brief details are as follows:

Acquired 1746/7
Beaumanoir, *Coutumes de Beauvaisis* (1690)
Bede, *Historiae ecclesiasticae* (1644)
Du Cange, *Glossarium* (1733)
Eckhart, *Leges Francorum* (1720)

In addition, he refers directly to some twenty other works which are in the catalogue of La Brède, though some of these works are also included in various important collections of documents. Publication was before 1714 and since the catalogue entries were made by Bottereau-Duval, we cannot tell whether the works were inherited or acquired.

Finally, he makes numerous references, without mentioning specific works, to the Councils of the Church, canon law and the decisions of the *parlements*. The most likely sources in the La Brède library are, respectively, the twenty-two works catalogued under *Concilia* (133-154), the thirty-seven works catalogued under *Juris canonici scriptores* (989-1025), and the twenty-one works catalogued under *Arrestographi* (862-882). Probably he inherited most of this part of the library, but the dates of publication or the handwriting of the entries shows that he added at least five volumes to the section on canon law and one volume to the section on decisions of the *parlements*.

In all, about two thirds of the works mentioned in the historical books of the *Lois* can be traced in the catalogue of La Brède. It is apparent that Montesquieu took pains to improve this library and to keep his documentation up to date. The full extent of his efforts cannot at all be measured since it is likely that neither the dates of publication nor the two booksellers' bills remaining at La Brède show us more than a small proportion of the acquisitions made in the seventeen years from 1714 to 1731, that is from the time Montesquieu returned to the château after his father's death to the time the library was catalogued. We know enough to respect Montesquieu's contribution to the library at La Brède and to wish we knew more. Let us now look at the other libraries which it is certain or probable that he used.

He certainly used the library of the Academy of Bordeaux. This was established when in 1738, Jean-Jacques Bel, his friend and contemporary died, and bequeathed his house and his library to the Academy, with the condition that the books should be accessible to the public on three days a week. The library, greatly enriched of course in the succeeding years, is now the Bibliothèque municipale at Bordeaux. The founder would rejoice if he could visit the library today. It is still open to the public and there the fortunate reader can consult with very little formality the books which Montesquieu and his contemporaries studied in the first half of the eighteenth century.

Galland, *Du Franc-aleu* (1637)
Hénault, *Nouvel abrégé chronologique* (1744)
Ragueau, *Glossaire* (1704)
Tacitus *De moribus Germanorum* (1652)
Thaumassière, *Anciennes et nouvelles coutumes* (1679)

Other works acquired after 1713
Boulainvilliers, *Histoire de l'ancien gouvernement* (1727)
Cujas, *Opera* (1604)
Dubos, *Histoire critique* (1734)
Ferrière, *Histoire du droit romain* (1718)
Fleury, *Histoire du droit français* (1730)
Leibniz, *Essai sur l'origine des Français* (1720)
Lindenbrog, *Codex legum* (1613)
Machiavelli, *Opere* (1726)

A catalogue of the library of the Academy of Bordeaux was drawn up in 1742. Certain entries are annotated 'J'ai tiré ce volume pour le remettre Montesquieu' [*sic*]. Françoise Weil has examined the catalogue and in her opinion these annotations were made before it was enlarged after a further bequest by Campagne in 1743. However Montesquieu was in Paris in 1742 and travelled back to La Brède in September 1743. On 25 September 1743, he wrote a charming letter to his daughter Denise to announce his arrival (*Correspondance*, Nagel iii.1038):

> Mon voyage a été très-heureux. Votre mère ne se porte pas trop bien. Le petit chat m'a fait enrager pendant tout le voyage dans ma chaise, mais je l'ai attaché par le cou avec un ruban, et quand il s'est vu cinq ou six fois pendu il a resté en repos [...]
>
> J'approuve fort que M. Capron voie vos dents, mais n'envoyez pas le tailleur à Mme. Geoffrin; dites-lui seulement de faire son mémoire au plus juste et envoyez-le moi; je mettrai ordre au même temps aux maîtres à chanter et à danser, car depuis que j'ai gagné mon procès vous ne courez plus de risque d'être religieuse.

No doubt Denise breathed a sigh of relief and meanwhile her father, putting aside the cares of journeys and cats, of a wife 'qui ne se porte pas trop bien' (perhaps her greeting after yet another long absence of her husband was less than enthusiastic), and bills for dentists and dressmakers, and singing and dancing masters, was able as usual to give his mind to his studies. It was probably about this time that he paid a visit to Bordeaux and borrowed books from the new library. Three of the annotations made by Montesquieu concern works mentioned in the historical books of the *Lois* and one of these is important: the *Histoire de Saint Louis* in the edition of 1668 by Du Cange which contained also the *Etablissements de Saint Louis* and the *Conseil à un ami* by Pierre de Fontaines. Françoise Weil does not suggest a provenance for the last two works, which are important sources of reference in Book xxviii of the *Lois*. Montesquieu produced Book xxviii working at top speed in the winter of 1747/8. He was then in Paris and borrowed the work again from the Bibliothèque du roi. It seems probable that Françoise Weil is right in placing the annotations of the catalogue of the Bordeaux library at about the end of 1743. No doubt Montesquieu, according to his custom, made notes at the time but found the Du Cange edition so important in Book xxviii that he had to investigate further.

Another library open to Montesquieu at Bordeaux was that of his intimate friend and correspondent Jean-Jacques Barbot, *président* of the Cour des Aides, and an active member of the Academy of Bordeaux. For a time he held the title of librarian though he resigned in favour of Canon Filippo Venuti in 1739. The transaction was perfectly cordial. Barbot did not need the preferment and his own library was extensive. In 1750 he gave his books to the Academy of Bordeaux. His friend admired the gesture though he did not follow suit. Barbot asked the Academy to house him rent free and Montesquieu writes on 31 October, 1750 (*Correspondance*, Nagel iii.1338):

> Si j'étais dans les circonstances où vous êtes, j'en ferais autant et il n'est point de doute que l'Académie doive accepter à baisemains, parce que les 400 livres qu'elle perd, ou qu'elle ne perd pas, s'emploieront en musique ou en fadaises, au lieu que votre bibliothèque, beaucoup plus estimable par le choix que par le nombre des livres, rendra celle de

l'Académie une des premières de France, parce que les deux en formeront une d'une grande distinction.

Barbot's donation had not yet been made when the *Lois* was published in 1748. Françoise Weil has identified three works which are mentioned in the historical books of the *Lois* and which may have been borrowed from Barbot. Included among these is the very important *Recueil des historiens*. Barbot possessed the first five volumes published from 1738 to 1744. Also included is the *Nouvel examen des fiefs en France* by Brussel, but although the 1750 edition was possessed by Barbot, Montesquieu obviously refers to the 1727 edition. It is possible that Barbot replaced the earlier edition by that of 1750, but we do not need to look for this explanation because Montesquieu in fact borrowed the work on 16 January, 1747 from the Bibliothèque du roi. There were two more works which he might have borrowed either from Barbot or from the Oratorians in Paris. He may indeed have done both, since he worked on the *Lois* both in his Bordeaux home and in Paris. This then is a convenient point to consider the resources available to him in Paris, and the use he made of them.

He was not a fleeting visitor to Paris. He had his own house there and stayed for months and even years on end, leaving the care of his property at home to his capable wife. In spite of the distractions – the 'dîners et soupers' which he mentions to Guasco[8] and his attendances at the Académie française which as m. Desgraves has shown were fairly regular in 1739 and 1741-43[9] – Montesquieu devoted a considerable part of his life in Paris as at La Brède to the composition of the *Lois*. For example, he is in full flow and obviously pleased with his progress in spite of the touching reference to his eyes when he writes from Paris to Barbot in 1742:[10]

A mon égard, mon ouvrage augmente à mesure que mes forces diminuent. J'en ai pourtant dix-huit livres à peu près de faits et huit qu'il faut arranger. Si je n'étais pas fou je n'en ferais pas une ligne. Mais ce qui me désole, c'est de voir les belles choses que je pourrais faire si j'avais des yeux. Quand je serai à Bordeaux je vous montrerai mon affaire et profiterai de vos conseils. Comme je dirige toutes mes études et tout mon travail sur cela, cela ne laisse pas que d'avancer.

It is not therefore surprising that he found it worthwhile to have a second library of his own at Paris. It would be most interesting to know what this contained, but if a catalogue was ever made it has not survived. All that we have is a very summary inventory and valuation dated 5 March 1755 which was drawn up in connection with Montesquieu's estate. M. Desgraves has published this nevertheless very useful document as an appendix to the catalogue of La Brède. The first item is the most relevant in connection with the historical books of the *Lois*. This reads: 'No. 1. Item, six volumes in folio, Glossarium, de Ducange, prisés ensemble la somme de trente livres.'

The fact that there were six volumes shows that this was the revised 1733 edition, and it is interesting to know that Montesquieu found it worthwhile to

[8] *Correspondance*, Montesquieu to Guasco, 1.8.1744, Nagel iii.1048.
[9] 'Montesquieu et l'Académie fraçaise', pp.215-17.
[10] *Correspondance*, Montesquieu to Barbot 2.2.1742, Nagel iii.1015.

have this excellent work of reference immediately to hand in Paris as well as at La Brède.

Most of the other 65 items appear to have been put together in lots and priced as for an auction. There is not much to interest the student of the historical books, but of course we cannot tell what may have been included in lots such as the followings: 'No. 53, item, onze volumes in-douze, dont Histoire du Nivernais, prisés ensemble la somme de six livres.'

It is however fascinating to see that Montesquieu had with him in Paris when he died the manuscript of the *Pensées*. This is in three volumes and the experts put it in a lot with seven others, the whole priced at nine livres! Fortunately his son had the sense not to sell.

The *Pensées* (and I expect the *Spicilège* too) probably accompanied Montesquieu several times on his journeys between La Brède and Paris. It is likely that other books were also taken to and fro, in the care of the secretary of the moment. However, there were of course other libraries at Paris and even when Montesquieu refers to a work which he possessed at La Brède it is quite possible that he found or checked the reference in another copy at Paris.

In any case, from amongst the works mentioned in the historical books of the *Lois* which are not at La Brède, Françoise Weil found seven which were in the library of the Oratorians at Paris at that time. Two of these, the *Treize livres des parlements de France* by Bernard de La Roche-Flavin published in 1617 (Bordeaux) and 1621 (Geneva) and the *Ordonnances des rois de France de la 3e race*, edited first by Eusèbe de Laurière and then by Secousse, published from 1723 onwards, were also in Barbot's library so that she says that there were at least two sources from which the books could have been borrowed. For the *Treize livres des parlements de France*, however, we need not look to the Oratory nor Barbot, because Montesquieu in fact borrowed the work from the Bibliothèque du roi on 23 March 1748. Of the others, by far the most important is the *Capitularia* of Baluze published in 1677. Detailed references to the *Capitularia* are made throughout Books XXVIII, XXX and XXXI of the *Lois*. Book XXVIII was composed in its final form at the end of 1747 and the beginning of 1748, and books XXX and XXXI were composed in their final form after Montesquieu's return to La Brède in the Spring of 1748 up to the time when they were sent to Jacob Vernet in Geneva for printing in September 1748. If therefore Montesquieu really borrowed the *Capitularia* from the Oratorian library, Desmolets must have acquiesced in a very extended loan. Given Montesquieu's reputation and standing, and the long friendship between the two men, this is quite possible.

Finally we come to the Bibliothèque du roi. Borrowers' records exist from 1735 and the first entry by Montesquieu is on 16 January 1747. Professor Shackleton tells us: 'It is at this time [1747-48] that he is seen from the registers to have borrowed from the Bibliothèque du Roi the *Grand Coutumier*, Brussel on fiefs, Muratori, Congringius, Du Cange on Saint Louis, Bouhier on the *Coutume de Bourgogne*, Loyseau, and Papon as well as some older works' (p.241). With the kind co-operation of the Bibliothèque nationale, I have consulted the registers showing the loans of books made in the years 1747 and 1748. These are in slim bound volumes, one for each year, and each is entitled 'Registre des Livres

prestés depuis et Compris l'année 1727 Jusqu'a present' (*sic*).[11] It appears that entries were crossed through when the books were returned and that details of loans still outstanding, sometimes for many years, were carried forward to each new register. Very conveniently for our purposes, the registers are divided into sections according to the letters of the alphabet and the loans are entered under the name of the borrower. The entries, which are in several hands, are not always legible, particularly since the great majority are crossed through with a stroke of the pen across the page, but it has been possible to identify with certainty nearly all the entries for loans made to 'M. le président de Montesquieu'.

The registers show that he borrowed works, sometimes more than one, on fifteen dates between 16 January 1747 and 23 March 1748. Another date, 1 April, has been added under 23 March 1748 and may possibly record the date when the work, the *Treize livres des parlements de France*, was returned. If so, this was a departure from the usual practice, but we know that Montesquieu left Paris for La Brède at this time to devote himself to preparing for the press his books on the feudal laws in their final form. He may have arranged for someone else, perhaps a secretary or a servant, to return the book to the library on the second date shown.

He was obviously working hard on his documentation, and as the books borrowed from the Bibliothèque du roi are a good indication of his particular interests during 1747 and 1748, the work of identification is well worthwhile. Except for the brief reference in professor Shackleton's biography, this source of information does not seem to have been studied before. These two years are the crucial period for the composition of the historical books of the *Lois* and most of the works Montesquieu consulted at this time are directly connected with them. The other borrowings are few in number, but would form the subject of an interesting study, which I hope to publish later.

Montesquieu was not one of those careless people who fail to return books. Two entries only are not crossed through. These are for works borrowed on 5 January 1748, originally made in the 1747 register and later transferred to the register for 1748. They are cancelled in the later register but not in the earlier one.

Usually the entry shows, in addition to the date and the name of the borrower, a short title and catalogue number. On occasions the title or catalogue number is missing, and in any case the numbers do not correspond with those now in use. However, the old manuscript catalogue of authors usually shows the number first given to the works listed under the name of each author, and this allows several positive identifications to be made. Another means of identification, when the catalogue number, but not the author or title, is given, is through the concordances.

At the end of this chapter I have placed, for ease of reference, two book lists. Table 1 shows the works which we know that Montesquieu consulted in connection with Books XXVIII, XXX and XXXI of the *Lois* and Table 2 shows the

[11] For a fuller description, see Jean-Pierre Le Bouler, Catherine Lafarge, 'Les emprunts de mme Dupin à la Bibliothèque du roi dans les années 1747-1750', *Studies on Voltaire* 182 (1979), pp.107-85.

works which he borrowed from the Bibliothèque du roi in 1747 and 1748. These two tables bring together a good deal of information from the article by Françoise Weil, from the catalogue of the library at La Brède and from my own researches.

Table 1 shows all the libraries from which the works were probably obtained and, in the case of works in the library at La Brède, the catalogue number and an indication of the person who made the catalogue entry. Publication dates are given wherever possible. My own researches have established the library concerned in the case of some works about whose provenance mlle Weil was uncertain. Cross references are made where these seem useful. There are of course a great many histories, annals, codes of law, capitularies and ordinancies mentioned in the *Lois* and included in one or more of the big collections. These are not included in the tables except where a separate edition was also at La Brède.

Table 2 shows the dates and entries made in the registers of loans for the works which Montesquieu borrowed from the Bibliothèque du roi, and a full identification wherever this has proved possible. The table shows that he borrowed 20 works (22 including duplicates) during the period 16 January 1747 to 23 March 1748. Seven of these (two of the seven borrowed twice) form part of the known documentation for Books XXVIII, XXX and XXXI of the *Lois* and several others are relevant to the subject of French civil and constitutional law. We know that he had borrowed at least two of the seven works previously from the Academy of Bordeaux, and some others were also available at La Brède or in the library of Barbot or that of the Oratorians in Paris.

From these two tables, certain conclusions can be drawn. First, that Montesquieu's serious interest in the development of French law and the history of the French constitution did not develop only as a result of writing the *Lois* but was present from an early date and no doubt helped to shape his theories of law. He acquired the 1710 edition of Du Cange's *Glossarium* in 1717, and the *Recueil de diverses pièces* which contains Leibniz's *Essai sur l'origine des Français* published in 1720 was acquired for La Brède not later than 1731/2. Boulainvilliers's *Histoire de l'ancien gouvernement de la France* published in 1727 was also acquired for La Brède not later than 1731/2. Montesquieu possessed the original 1674 edition of Claude Fleury's *Histoire du droit français*, and acquired the 1730 edition of Argou's *Institution au droit français*, which contains a revised edition of Fleury's treatise, and entered this in the catalogue of La Brède in his own hand. Dubos's *Histoire critique de l'établissement de la monarchie française*, published in 1734, and the *Codex Legum* of 1613 by Lindenbrog were entered in the catalogue by a secretary during the period 1734/38. Secondly it is clear that Montesquieu made several important acquisitions in 1746/7 in order to document himself for the historical books: the *Coutumes de Beauvaisis* by Beaumanoir (1690); Bede's *Ecclesiastical history and Anglo-Saxon chronicle* (1644); the revised 1733 edition of Du Cange's *Glossarium*; the *Leges Francorum* by Eckhart (1720); Galland's *Du Franc-aleu* (1637); the revised 1704 edition by Laurière of Ragueau's *Glossaire du droit français*; a separate edition of 1652 of the *De moribus Germanorum* by Tacitus; and the *Anciennes et nouvelles coutumes locales de Berry et de Lorris* by Thaumas de La Thaumassière (1679). He also acquired at this time Hénault's *Nouvel abrégé chronologique de l'histoire de France*; this was probably more out of friendship than

from a desire to improve his documentation, though he may have found the work useful as a handy source of reference. Thirdly, we see that Montesquieu went to the trouble of borrowing a good many works, including some of the first importance. We know that from the Academy of Bordeaux, probably in 1743, he borrowed tome i of Dumont's *Corps universel diplomatique* (1726), the Du Cange edition of Joinville's *Histoire de Saint Louis*, which contains also the *Etablissements de Saint Louis* and the *Conseil à un ami* (1668), and tome i of Martène's *Thesaurus novum anecdotorum* (1717). The library of the Oratorians in Paris and/or Barbot's library in Bordeaux are the probable sources from which he borrowed Baluze's *Capitularia* (1677), Bouquet's *Recueil des historiens* (1738 onwards), the *Variae epistolae* of Cassiodorus, Catel's *Mémoire de l'histoire de Languedoc* (1633), Goldast's *Collectio constitutionem imperialum* (1713), and the *Ordonnances des rois de France* by Laurière and Secousse (1723 onwards). Lastly we see that while in Paris in 1747/8 he borrowed from the Bibliothèque du roi a number of works, which he mentions in the historical books of the *Lois*, and which were also at La Brède, in the library of the Academy of Bordeaux, Barbot's library, or that of the Oratorians at Paris. These works are: Boutillier's *Somme rurale ou le Grand Coustumier* (1603) (probable identification); Brussel's *Nouvel examen de l'usage des fiefs en France* (1727); tome i of Dumont's *Corps universel diplomatique* (1726); the Du Cange edition of Joinville's *Histoire de Saint Louis*, etc. (1668); La Roche-Flavin's *Treize livres des parlements de France* (1621); the works of Loyseau (1666); 8 tomes of Muratori's *Rerum italicarum scriptores* (1723 onwards) and the works of Procopius (1662/3). He had certainly studied at least some of these works previously, but no doubt he wished to refresh his memory and check his references.

Table 2 is of particular interest as showing the work put in by Montesquieu to verify and enlarge his documentation during a period of fifteen months in Paris in 1747-1748. When we realise that, in addition, he was engaged in bringing out a new edition of the *Considérations* and in seeing the greater part of *De l'esprit des lois* through the press as well as actually composing Book XXVIII, we can only admire the talents and stamina of the man. In order to write Books XXX and XXXI, he returned to the tranquillity of La Brède and the resources, no doubt supplemented by copious notes, of his own library.

The tables do not tell us the comparative importance of the various works as documentation for the historical books of the *Lois*. Some were fundamental and Montesquieu refers to them frequently, while others are just the subject of a passing reference. We will look at this in more detail in the next two chapters, and then consider the value of this documentation and to what extent it was the best available at the time.

Table 1

Works of reference used in books XXVIII, XXX and XXXI of *De l'esprit des lois*.

Key: 1. Number (e.g. 292) refers to catalogue number in the library at La Brède

2. Lower case letter (e.g. d) refers to authorship of entry in library catalogue:
   d secretary Bottereau-Duval – up to 1731-2
   e secretary employed 1731/2 – 1738/9
   h secretary employed 1740-43
   m Montesquieu
   o secretary employed 1746-47

3. Dates (e.g. 16.1.1747) are dates of loan from Bibliothèque du roi

N.B. For works not listed in the La Brède catalogue there will be no number and letter entry.

Agobard, saint, *Opera* (Paris 1605), 292 d. The letter of Agobard to Louis the Pious is also in Duchesne IV and Baluze, *Capitularia*.

Agathias *see* Zosimus.

Aimoin, *De gestis Francorum* (Paris 1603), 2898 d; (Paris 1567) 2899 d. Also in Duchesne iii and *Recueil des historiens* iii.

Aubert le Mire, *Bibliotheca ecclesiastica* (Antwerp 1639-49).

Aufrerius (Aufréri, Etienne), *Décisions de la chapelle de Toulouse* (1508 et seq.), 812d.

Baluze, Etienne, *Capitularia regum Francorum* (Paris 1677). Oratorian library.

Beaumanoir, Philippe de Rémi, sieur de, *Coutumes de Beauvaisis* (Paris et Bourges 1690), 884 o.

Bede, the Venerable, *Historiae ecclesiasticae gentis Anglorum cum chronologia saxonica* (Cambridge 1644), 3200 o. Montesquieu's reference is to the commentary by William Lambard, *De priscis Anglorum legibus*.

Boulainvilliers, Henri de, *Histoire de l'ancien gouvernement de la France* (La Haye et Amsterdam 1727), 2912 d.

Bouquet, dom Martin, *Recueil des historiens des Gaules et de la France* (Paris 1738 et seq.). Probably lent by Barbot, who possessed tomes i-v published 1738-44. This collection, with the *Historiae Francorum scriptores*, ed. André and François Duchesne, is Montesquieu's source for many early chronicles, etc.

Boutillier, Jean, *Somme rurale ou le Grand Coustumier*, ed. L. Charondas le Caron (Paris 1603), 885 d, 27.4.1747 (probable date).

Boerius (Boyer, S.), *Anciens et nouveaux règlements du Parlement de Guienne* (Bordeaux 1703), 914 d.

Brussel, Nicolas, *Nouvel examen de l'usage des fiefs en France*, 2 vols. (Paris 1727),

16.1.1747 and 21.1.1747. Barbot acquired the 1750 edition. Possibly this replaced the 1727 edition, which he may have lent to Montesquieu.

Caesar, Caius Julius, *De bello gallico*, 2817-2820 d. Montesquieu possessed five editions of the works of Caesar, published 1533, 1546, 1622, 1635 and 1697.

Canisius (Henri de Hondt), *Antiquae lectiones* (Ingolstadt 1601-8).

Cassiodorus, Magnus Aurelius, *Variae epistolae*. Oratorian library.

Catel, Guillaume de, *Mémoire de l'histoire de Languedoc*, ed. Charles de Catel (Toulouse 1633). Oratorian library.

Codex legum antiquarum, see Lindenbrog.

Collectio constitutionum imperialium, see Goldast.

Corps universel diplomatique, see Dumont.

Corpus juris civilis (Lyon 1612), 705 d. In addition to Roman law, this includes the *Livres des fiefs* or *Libri feudorum*.

Cujas, Jacques, *Opera omnia* (Lyon 1604), 734 e. Includes the *De Feudis*.

Défontaines, P., *see* Fontaines, Pierre de, and Joinville.

Dubos, abbé Jean-Baptiste, *Histoire critique de l'établissement de la monarchie française dans les Gaules* (Paris 1734), 2930 e.

Du Cange, Charles Dufresne, Sieur, *Glossarium ad scriptores mediae et infimae latinitatis* (Paris 1733), 2463 o. Montesquieu also possessed at La Brède a copy of the 1710 edition, purchased in 1717, and there was a copy of the 1733 edition in his Paris library.

Duchesne, André and François, *Historiae Francorum scriptores* (Paris 1636-49), 2932 d. This collection, with the *Recueil des historiens*, ed. Bouquet, is Montesquieu's source for many early chronicles, etc.

Dumont, Jean, *Corps universel diplomatique*, 8 vols. (Amsterdam 1726-31), i, 30.1.1747. Montesquieu also borrowed this from the Academy of Bordeaux, probably in 1743. (5 supplementary volumes were published in 1739.)

Du Tillet, *see* Tillet.

Eckhart, Johann Georg, *Leges Francorum salicae et Ripuarum* (Leipzig and Frankfurt 1720), 825 o. Contains also the *De origine Francorum* by Leibniz.

Eginhard, *De vita et gestis Caroli magni* (Cologne 1521), 2915 d. Also in Duchesne ii and *Recueil des historiens* v.

Etablissements de Saint Louis, see Joinville.

Ferrière, Claude-Joseph, *Histoire du droit romain* (Lyon 1718), 716 d. Entered in catalogue under Justinien 1er empereur, *Institutiones*.

Fleury, Claude, *Histoire du droit français* (Paris 1674 and Paris 1730), 787 d and 767 m. The 1730 edition is included in Argou, *Institutions du droit français*.

Fontaines, Pierre de (also known as Défontaines), *see* Joinville.

Galland, Auguste, *Du Franc-aleu* (Paris 1637), 954 o.

Goldast, M., *Collectio constitutionum imperialium* (Frankfurt 1713). Oratorian library.

Grégoire de Tours, *Historia Francorum*, 2955 d and 2956 d. Montesquieu possessed two editions at La Brède, Paris 1568 and Basle 1610. The *History* is also in Duchesne i. The references in the *Lois*, however, are from *Recueil des historiens* ii.

Hardouin, le père Jean, edition of *Pliny the Elder* (Caius Plinius Secundus) (Paris 1723) 1809 e. Montesquieu possessed the works of Hardouin in his Paris library.

Hénault, le président Charles-Jean-François, *Nouvel abrégé chronologique de l'histoire de France* (Paris 1744), 2959 o.

Hondt, Henri de, *see* Canisius.

Joinville, le sire Jean de, *Histoire de Saint Louis*, containing also the *Etablissements de Saint Louis* and *Le Conseil à un ami* by Pierre de Fontaines or Défontaines, ed. Du Cange (Paris 1668), 2.1.1748. Montesquieu also borrowed this from the Academy of Bordeaux, probably in 1743. Although much material on the life of Saint Louis, the Crusades and the struggle with the Albigensians is in Duchesne v, Joinville is not included.

Lambard, William, *see* Bede, the Venerable.

La Roche-Flavin, Bernard de, *Treize livres des parlements de France* (Geneva 1621), 23.3.1748. Montesquieu might also have borrowed this work from the Oratorian library or from Barbot.

Laurière, Eusèbe de, *see Ordonnances des rois de France* and Ragueau, François.

Lecointe, le père Charles, *Annales ecclesiastici Francorum* (Paris 1665-83). The *Lois* contains just a passing reference. Montesquieu's knowledge of the work is shown by a comment in one of the Pensées (Nagel 189, Pléiade 1581), about 1720.

Leibniz, Gottfried Wilhelm, *Essai sur l'origine des Français* in the *Recueil de diverses pièces sur la philosophie etc.*, ed. Des Maizeaux (Amsterdam 1720), 1532 d.
Also in latin: *De origine Francorum – see* Eckhart.

Le Gendre, Louis, *Mœurs et coutumes des Français* (Paris 1712), 2949 d.

Lindenbrog, Friedrich, *Codex legum antiquarum* (Frankfurt 1613), 820 e. Four versions of the Salic law, and also versions of the laws of the Ripuarians, Burgundians and Visigoths, are in the *Recueil des historiens* iv. Versions of the laws are also in Baluze, *Capitularia*.

Loyseau, Charles, *Discours sur l'abus des justices de village* (Paris 1666), 31.1.1748. This is a treatise of forty pages, contained in the complete works of Loyseau. Montesquieu might also have borrowed this work from Barbot.

Machiavelli, Niccolò, *History of Florence* included in *Opera continente i cinque primi libri delle historie fiorentine* (Nell' Haya 1726), 2405 d.

Marculf, *Monachi formularum libri duo* (Paris 1613), 967 d, 968 d and 2998 d. Also in Baluze, *Capitularia* and *Recueil des historiens* iv.

Martène, dom Edmond, *Thesaurus novus anecdotorum*, 5 vols. (Paris 1717), i. Montesquieu borrowed this from the Academy of Bordeaux, probably in 1743.

Muratori, Ludovico Antonio, *Rerum italicarum scriptores*, 25 vols. (Milan 1725-51), i-viii. 23.8.1747 and 19.1.1748.

Ordonnances des rois de France de la 3e race, i, ed. Eusèbe de Laurière (Paris 1723 et seq.). Probably lent by Barbot, who possessed tomes i-vii, published 1723-45.

Paul-Emile de Vérone, *Historia gallica*, 2896 d.

Procopius of Caesarea, *Arcana historia* (Lyon 1623), 2862 d.
Histoire de la guerre des Goths (Lyon 1578), 2863 d. *see also* Zosimus.
Complete Works (Paris 1662-3), 2 vols., 5.1.1748. Extracts also in Duchesne i and *Recueil des historiens* ii.

Ragueau, François, (*Glossaire du droit français*), revised edition by Eusèbe de Laurière, entitled: *L'Indice des droits royaux et seigneuriaux* (Paris 1704), 2496 o.

Recueil des historiens, see Bouquet.

Tacitus, *De moribus Germanorum* (Helmstedt 1652), 3109 o. Montesquieu also possessed two editions of the works of Tacitus – Antwerp 1589 and Paris 1559, catalogue nos 2880 and 2881, and an edition of Tacitus and Velleius Paterculus in French – Paris 1610, catalogue no. 2882.

Thaumas de La Thaumassière, Gaspard, *Anciennes et nouvelles coutumes locales de Berry et de Lorris* (Bourges 1679), 904 o.

Tillet or Du Tillet J., *Recueil des rois de France* (Paris 1618), 3055 d.

Valois, Adrien de and Henri de, *Gesta Francorum*, vol.i of *Rerum Francicorum*, 3 vols. (Paris 1646-58).

Velleius Paterculus, *see* Tacitus.

Vies des Saints ii and iii (Paris 1687), 282 d and 284 d. Many lives of the saints are also in Duchesne and in the *Recueil des historiens*.

Zosimus, *Historiae novae libri sex quibus additae sunt historiae Procopii, Agathiae, Jornandi* (Basle 1531), 2732 d.

Table 2

Chronology: works borrowed by Montesquieu from the Bibliothèque du roi in 1747 and 1748

Key: 1.* indicates works of reference used in Books xxviii, xxx and xxxi of *De l'esprit des lois*

† indicates other works relevant to these Books

2. Date (e.g. 16.1.1747): date of entry in register of loans

3. Number (e.g. 2635 1.2 or F988): Catalogue number stated in register. (N.B. This differs from the present catalogue.)

4. Other details shown in register, if any

5. *Note*: Author's note

*16.1.1747, 2635 1.2, Brussel des fiefs. *Note*: This is: Nicholas Brussel, *Nouvel examen de l'usage des fiefs en France*, 2 vols. (Paris 1727).

*21.1.1747, ? 2635.1.0. *Note*: The catalogue number looks the same as for the previous entry. Probably Montesquieu borrowed volume i of Brussel again.

30.1.1747, F158, (illegible). *Note*: This is: Baldi Ubaldi Perusini, *Jurisconsulti [...] commentaria* (Venice 1616).

*30.1.1747, (not shown – it was F956), le 1^e^ vol. du corps diplomatique. *Note*: This is: Jean Dumont, *Corps universel diplomatique*, 13 vols. (Amsterdam 1726-31), i.

*27.4.1747, F985 and 986, Le Grand Coustumier. *Note*: Identification uncertain because of a gap in the concordances for F985 and 986. The work is probably: Jean Boutillier, *Somme rurale ou le Grand Coustumier*, ed. L. Charondas le Caron (Paris 1603).

†27.4.1747, F988. *Note*: This is: L. Charondas le Caron, *Pandectes ou digestes du droit français*, 2 vols. (Paris 1607).

5.4.1747 (*Note*: as this follows 27 April, it may be a mistake for 5 May), G422 I-4, Les petits géographes de scylase et périple. *Note*: This is: *Geographiae veteris scriptores graeci minores, cum interpretatione latina, dissertationibus ac annotationibus*, 4 tomes and 6 vols. (Oxford 1698-1717). Vol. i contains: Hannonis Periplus, interprete Conrado Gresnero; Scylacis Periplus, interprete Isaaco Vossio.

29.5.1747 (no number), Demosthène de francfort et Denys d'Halicarnasse, 2 vols. *Note*: The first work is probably a 1604 edition, published in Frankfurt, of the works of Demosthenes. The second work is probably the *De structura orationis* of Denis of Halicarnassus, the third edition to be published in London, 1747, Greek with Latin translation, two parts in one volume. The register shows that Nicolas Fréret borrowed this work on 23.10.1747.

14.8.1747, (no number), Opera et vita. (?) Noadt. *Note*: not identified.

*23.8.1747, (no number shown; it was K15), 8 vols des historiens d'italie de

Muratori. *Note*: This is: Ludovico Antonio Muratori, *Rerum italicarum scriptores*, 25 vols. (Milan 1725-51), i-viii.

23.8.1747, $\frac{F406}{2}$. *Note*: This is: John Eisenhart, *Processus instantiae restitutionis judicum sententiae et decreta* (Helmstedt 1685).

†23.8.1747, F4177. *Note*: This is: *De l'usage et de l'autorité du droit civil dans les états des princes chrétiens, traduit du latin d'Arthurus Duck, jurisconsulte anglais* (Paris 1689).

†22.10.1747, M463, Conringius. *Note*: This is: Hermann Conring, *De Germanicorum habitus antiqui ac novi causis Dissertatio* (Helmstedt 1645).

*2.1.1748, L144, St Louis par Du Cange. *Note*: This is: le sire Jean de Joinville, *Histoire de Saint Louis*, containing also the *Etablissements de Saint Louis* and *Le Conseil à un ami* by Pierre de Fontaines or Défontaines, ed. Du Cange (Paris 1668).

†5.1.1748, F1112 1.2, Coutume de Bourgogne par le Président Bouhier. *Note*: This is: le président Jean Bouhier, *Histoire de la coutume de Bourgogne* (Dijon 1742).

*5.1.1748, j105 and 106, 2 vols en Procope. *Note*: This is an edition of Procopius containing: *Historiarum Libri VIII,* Gr. Lat. emendati et supplementi aucti. interpr. Cl. Maltroto S. J.; *De Aedificiis Justiniani Libri VI*, auctiores et emendatiores, eodem interpr.; *Anecdota Historia*, ex editione et versione Nie. Alemanni recognita a Maltroto; *Lectiones variae in Procopium*, 2 vols. (Paris 1662-3).

*19.1.1748, K15, 2, Muratori. *See* entry for 23.8.1747.

*31.1.1748, F996, Charles Loyseau. *Note*: This is an edition of the works of Loyseau containing: *Les cinq livres du droit des offices; Traittez des Seigneuries; Des Ordres et simples dignitez; Du déguerpissement et délaissement par hypothèque; De la garantie des Rentes; Des abus des Justices de village.* (Paris 1666).

†21.3.1748, F990, Papon. *Note*: This is: Jean Papon, *Les Trois Notaires*, 3 vols. (Lyon 1576-78).

†21.3.1748, F997, 2 vols Bacquet. *Note*: This is *Les Œuvres de Jean Bacquet, avocat du Roy*, probably the edition published in 2 vols., Paris 1744. The B. du Roi had three other editions with the same catalogue number – 2 vols., Paris 1608; 3 vols., Paris 1664; 1 vol., Paris 1688. The 1744 edition was 'augmentée considérablement' by Claude de Ferrière and Claude-Joseph de Ferrière.

*23.3.1748 and again, 1.4.1748, 314, la Rocheflavin. *Note*: This is: Bernard de la Roche-Flavin, *Treize livres des parlements de France* (Geneva 1621).

6. *De l'esprit des lois.* Book XXVIII: sources

In this chapter and the next I intend to look at the way in which Montesquieu uses his documentation to support his historical theories. In this way I hope to distinguish those works which he found of fundamental importance from those to which he turned for just a telling detail.

In Book XXVIII, the subject is 'De l'origine et des révolutions des lois civiles chez les Français'. The book opens with a discussion of the Barbarian codes of law, introduced by the first sentence of the first chapter: 'Les Francs étant sortis de leurs pays, ils firent rédiger par les sages de leur nation, les lois saliques'. Montesquieu interprets the Salic law in the light of other Barbarian codes of law, and refers in this first chapter, to all the codes in the *Codex Legum* by Lindenbrog, published in 1615. These are, in the order in which they appear in Lindenbrog:

Lex Wisigothorum
Edictum Theodorici Regis
Lex Burgundiorum
Lex Salica
Decretio Childeberti (added to the Lex Salica)
Lex Alemannorum
Lex Baiwariorum
Lex Ripuariorum
Lex Saxonum
Les Anglorum et Werinorum. Hoc est Thuringorum
Lex Frisonum
Lex Longobardorum

References to the codes of law continue throughout Book XXVIII, though they become less frequent as the story continues through the development of the feudal system and the times of ignorance, when local customs almost entirely replaced general laws, up to the time of Saint Louis, and beyond him to the time when legal systems were gradually re-established. The references are to so many of the Barbarian codes that it seems certain that his main work of reference was the *Codex legum.* There is some evidence, however, that he supplemented this by reference to tome iv of the *Recueil des historiens*, published in 1741, which contains the four codes which had applied in different parts of France, that is Salic law and the laws of the Ripuarian Franks, the Burgundians and the Visigoths. The *Codex Legum* contains only one version of Salic law, and this is the version as revised by Charlemagne, but the *Recueil* contains three versions of the primitive law as well as the revision by Charlemagne. Montesquieu's short chapter 21 of Book XXVIII shows that he had compared the primitive and the revised versions and thought about the differences:

> C'était chez les Germains, dit Tacite (a), une grande infamie d'avoir abandonné son bouclier dans le combat; et plusieurs, après ce malheur, s'étaient donné la mort'. Aussi l'ancienne loi (b) salique donne-t-elle quinze sols de composition à qui on avait dit par injure qu'il avait abandonné son bouclier.

Charlemagne (c), corrigeant la loi salique, n'établit dans ce cas que trois sols de composition. On ne peut pas soupçonner ce prince d'avoir voulu affaiblir la discipline militaire: il est clair que ce changement vint de celui des armes; et c'est à ce changement des armes que l'on doit l'origine de bien des usages.

Notes:
(a) *De morib. Germ.*
(b) Dans le *Pactus Legis salicae.*
(c) Nous avons l'ancienne loi, et celle qui fut corrigée par ce prince.

In chapter 2 of Book XXVIII there is the first reference to the *Capitularia regum Francorum* of Baluze. The capitularies are decrees issued by the kings to deal with various issues as they arose, though in fact Baluze's work was wider in scope than this would suggest. The collection, which is in two volumes, begins with 'capitularia veterum regum' from about 560 AD and continues to Charlemagne and the empire, Louis the Pious who inherited the empire from Charlemagne, and the sons and grandsons of Louis the Pious who divided the empire between them and who ruled over parts of France at different times up to about the end of the ninth century. The collection comes to an end during the tenth century in the period of great confusion which preceded the establishment of the 'third race', the Capetian dynasty in 987. Montesquieu makes considerable use of the *Capitularia* in Book XXVIII, but he is of course obliged to go to other sources for the more modern periods.

Baluze's collection included some other texts. Among them were the formulas or model enactments of Marculf, dating from about 650. The 'formulas' are mentioned in Book XXVIII and also, in greater detail, in the later books. This work – the *Monachi formularum libri* – was well known to scholars. Montesquieu himself possessed at La Brède three copies of the edition by Bignon, and he could also have consulted editions in the collection by Duchesne and in the *Recueil des Historiens* as well as in the *Capitularia* of Baluze. The references in Book XXVIII illustrate the sort of institutions which existed at this early period of France's history.

A good example of the way in which various authorities are brought together to illustrate a point occurs during the discussion about the rivalry between ecclesiastics and nobles in connection with the procedures for settling disputes. The text reads: 'D'un côté, les ecclésiastiques se plaisaient à voir que, dans toutes les affaires séculières, on recourût aux églises et aux autels; et de l'autre une noblesse fière aimait à soutenir ses droits par son epée.' To this a footnote is added: 'Le serment judiciaire se faisait pour lors dans les églises, et il y avait dans la première race, dans les palais des rois, une chapelle exprès pour les affaires qui s'y jugeaient. Voyez les *formules de Marculfe* Liv.I Ch.XXXVIII, les lois des Ripuaires, tit.LIX para.4 et tit.LXV, para.5; l'histoire de Grégoire de Tours; le capitulaire de l'an 803, ajouté à la loi salique' (*Lois*, XXVIII, 18).

Montesquieu sets his study of developments in France in a European context and there is no doubt that the work demands this sort of perspective. Roman Gaul for example where the story begins, was just a small part of the Roman empire and, again, Roman law is probably the most powerful influence in legal history not only in France but throughout Europe and perhaps the world. The Franks who penetrated into Gaul formed only one part of the Barbarian invasion

which spread over Europe and the various Barbarian codes of law have much in common. Furthermore the territorial empire of the Franks changed over the years with conquests, losses, divisions between brothers and reunions of lands until, in the time of Charlemagne and his immediate successor, the empire extended far over Europe, only to break again into various shifting parts. We have already seen that in the *Codex Legum*, Montesquieu had a source of reference for the laws brought out of Germany by many of the Barbarian tribes. We have also seen that in the *Recueil des historiens* he had a more up to date reference for the four codes current in parts of France. It is noticeable that, apart from these four codes, his most frequent source of reference is to the Law of the Lombards. Up to date editions of the Law of the Lombards and other Italian documents were contained in the *Rerum italicarum scriptores* published by the Italian archivist Muratori from 1723 onwards, and we shall see when we come to consider the value of Montesquieu's sources that the existence of this specialised collection came to his attention in 1728. He refers directly to this collection in chapters 18 and 36 of Book XXVIII, in addition to several other references to the Law of the Lombards.

The references to the Barbarian codes of law are frequently detailed and precise – including the book (or section), title and paragraph. This is not the case with Roman law, though it is emphasised all through the early chapters of Book XXVIII that Roman law coexisted with the Barbarian codes, becoming dominant in some areas and losing its hold in others for reasons which Montesquieu believes he can explain, and eventually disappearing as written law, in the same way and for the same reasons as the Barbarian codes, that is partly owing to the growth of the feudal system which made it impossible for any rule of law to apply across feudal boundaries, and partly because of the poverty and ignorance into which the country fell as a result of civil wars and Norman invasions. Unlike the Barbarian codes, however, Roman law had a renaissance as a written law. Montesquieu was writing for an educated public and when he mentions in chapter 4 of Book XXVIII that in the domain of the Franks the Theodosian code applied to the Roman inhabitants, he does not go into details about this code. Nor does he give details of the abridgement (or breviary) of Alaric which applied to Roman inhabitants in the domain of the Visigoths. He just tells his readers that the Theodosian code was finished in 438 and that the compilation of Alaric was made in 'la vingtième année du règne de ce prince, et publiée deux ans après par Anian, comme il paraît par la préface de ce code'. The thesis put forward in Book XXVIII (which, according to Jean Brethe de La Gressaye, is still accepted today), is that where Roman law became dominant, though it fell into disuse as written law just like the Barbarian codes, the memory remained and formed the basis of the customs practised. (*Lois*, XXVIII, note 46). At the end of chapter 12 Montesquieu says:

> Il ne resta presque à ces provinces que le nom de pays de droit romain ou de droit écrit, que cet amour que les peuples ont pour leur loi, surtout quand ils la regardent comme un privilège, et quelques dispositions du droit romain retenues pour lors dans la mémoire des hommes. Mais c'en fut assez pour produire cet effet que, quand la compilation de Justinien parut, elle fut reçue dans les provinces du domaine des Goths et des Bourgui-

gnons comme loi écrite; au lieu que, dans l'ancien domaine des Francs, elle ne le fut que comme raison écrite.

Further on, in chapter 42, he explains how the code of Justinian came to be known and practised again in France. Here he is drawing on a résumé, included in the *Spicilège*,[1] of the *Histoire du droit romain* by Ferrière, published in 1718. He does not give a source for the code of Justinian either, but this was really unnecessary because the code is contained in the *Corpus juris civilis*, a work which was known by anyone with experience of legal practice, since it formed the basis for much of French civil law. Naturally there was a copy of the *Corpus juris civilis* at La Brède, and detailed notes made by Montesquieu on the *Codex*, *Digest* and *Novellae* of Justinian still exist.[2] He was however concerned about the ignorance of Roman law amongst his contemporaries, and compares the present times unfavourably to those: 'Où l'on ne faisait pas gloire d'ignorer ce que l'on doit savoir, et de savoir ce que l'on doit ignorer; où la facilité de l'esprit servait plus à apprendre sa profession qu'à la faire; et où les amusements continuels n'étaient pas même l'attribut des femmes' (*Lois*, XXVIII, 45).

In addition to the more general legal enactments (Barbarian codes, Roman codes, capitularia) and to the individual edicts and decrees, Montesquieu makes use of early histories and chronicles to illustrate the development of civil law, though this type of documentation is less important in Book XXVIII than in the books concerning the relationship of the monarchy to the feudal system.

There are references also to the history of Gregory of Tours (540 to 594) which was, like the formulae of Marculf, quite widely available. At La Brède there were two individual editions, published in 1568 and 1610. The work, with its various continuations, is also included in tome i of Duchesne and tome ii of the *Recueil des historiens*. The references to Gregory of Tours are usually precise, indicating the book and the chapter concerned. There is however a later reference, in Book XXXI, which indicates a page number and this makes it certain that at least on that occasion he was using the latest available edition, which was contained in the *Recueil*.[3]

For other early chronicles and lives of the kings or saints in the period of the first two races Montesquieu usually refers to the titles of the texts. These are taken sometimes from individual publications, sometimes from Duchesne and sometimes, up to the time of Charlemagne, from the *Recueil*, and it is often impossible to be sure of the actual edition he is using. In another chapter I shall discuss the relationship between the collections.

The individual works cover quite a wide range. There is a reference to Caesar's *De bello gallico* to illustrate the individualism of Barbarian tribes and their laws, and to the history of Velleius Paterculus and the *De moribus Germanorum* of Tacitus in connection with single combat and the 'point d'honneur'. The European context is shown by references to the *De bello Gothorum* by Procopius and the letters of Cassiodorus; these authors wrote in the 6th century concerning, amongst other matters, the Romans and the Ostrogoths in Italy. There is

[1] *Spicilège* 266 (ms pp.210-12), Nagel ii.758-59; Pléiade ii.1282-83.

[2] In the *Collectio juris* (see Appendix below).

[3] *Lois*, XXXI, 2. Montesquieu's note: 'Voy. Grégoire de Tours Liv.IV p.227.'

mention of a chronicle of 749 included by G. de Catel in his *Mémoire de l'histoire de Languedoc*, and of a letter written by Agobard, Archbishop of Lyon in the 9th century, to Louis the Pious. The letter of Agobard is included in the collections of Duchesne and Baluze, but the footnote shows that the source was actually the separate edition of the *Works of Agobard* which was at La Brède.

To assist himself in understanding his sources, Montesquieu had the *Glossarium* of Du Cange. The work is a 'glossarium mediae et infimae latinitatis' that is a dictionary of and commentary on the terms used in later latin texts. We may suppose that he kept the *Glossarium* to hand for easy reference when he was devouring[4] the text of the laws, the capitularies, the chronicles etc., though his direct references in Book XXVIII are minimal. Just to look at one footnote, however, shows what Du Cange could contribute. This mentions 'les autorités sans nombre là dessus (on retention of Roman law for ecclesiastics) rapportées par M. Du Cange, au mot *Lex Romana*' (Lois, XXVIII, 4). Turning to the *Glossarium*, we find under *Lex*, subsection *Lex Romana*, last paragraph: 'Sed et Legem Romanam in causis Ecclesiasticis observatam potissimum docent.' Then follow fourteen authorities adduced by Du Cange himself, with three added by later editors up to 1733.

If we now take an overall look at Montesquieu's sources for his theory of the development of civil law under the Merovingians and the Carolingians, we can summarise them as follows:

For the Barbarian codes of law, he uses the *Codex legum* of Lindenbrog, supplemented by the *Recueil des historiens* for Salic law and by the *Rerum italicarum scriptores* for the law of the Lombards.

For Roman law, he refers to the codes of Theodosius and Justinian. He does not go into details, but considers the influence of Roman law through the centuries, and offers an explanation as to why the code of Justinian became the basis of written law in parts of France.

He illustrates the development of civil law by reference to early histories, chronicles and lives. He relies on the *Historiae Francorum scriptores* by Duchesne, supplemented by the *Recueil des historiens* and by certain individual works including Caesar's *De bello gallico*, the works of Agobard and the *Mémoire de l'histoire de Languedoc* by Catel.

Alongside this documentation, as an all-purpose dictionary and work of reference for the latin texts, there is the *Glossarium* of Du Cange.

What about the work of later historians, other than the scholars who commented on editions of the texts? The pattern is already clear. Montesquieu is conscious of putting forward a new view of French history, and he does so confidently: 'Je sais bien que je dis ici des choses nouvelles; mais si elles sont vraies, elles sont très anciennes. Qu'importe après tout que ce soit moi, les Valois, ou les Bignons qui les aient dites?'[5] He just comments on Leibniz in a

[4] 'Tous ces écrits froids, secs. insipides et durs il faut les lire, il faut les dévorer' (*Lois*, XXX, 11).

[5] *Lois*, XXVIII, 4. Jérôme Bignon (1589-1656), a noted scholar and advocate general of the *parlement* of Paris did valuable work with medieval manuscripts. He is the editor of the *Formulae* of Marculf at La Brède. Adrien de Valois was historiographer to Louis XIV; he and Henri de Valois published the *Gesta Francorum* 1646-58.

footnote to the first sentence of Book XXVIII which concerns the written code of Salic law: 'M de Leibnitz dit, dans son *Traité de l'origine des Francs*, que cette loi fut faite avant le règne de Clovis: mais elle ne put l'être avant que les Francs fussent sortis de la Germanie, ils n'entendaient pas, pours lors, la langue latine.' It is worth noting, incidentally, that Montesquieu had not read Leibniz very carefully. The latter argues that there was a written Salic law before Clovis, but not that it was written in Latin. He thinks that it was drawn up by the Franks before they became Christians and also at a time when they did not have a king, but only leaders of the various 'cantons'. He considers that the law was written down, in the Teutonic language, while the Franks inhabited Germany, and that later, under Clovis and his successors in France, the law was translated into Latin, with some of the Teutonic words preserved, and adapted for new needs.[6] A little later, in chapter 3, Montesquieu anticipates the attack he makes in Book XXX on Dubos's *Histoire critique de la monarchie française*:

> Cependant un auteur célèbre forme un système de l'*Etablissement des Francs dans les Gaules*, sur la présupposition qu'ils étaient les meilleurs amis des Romains. Les francs étaient donc les meilleurs amis des Romains, eux qui leur firent, eux qui en reçurent des maux effroyables? Les Francs étaient amis des Romains, eux qui, après les avoir assujettis par leurs armes, les opprimèrent de sang-froid par leurs lois? Ils étaient amis des Romains comme les Tartares qui conquirent la Chine étaient amis des Chinois.

The only other relatively modern work of history mentioned is Machiavelli's *History of Florence* and that just rates a footnote in chapter 7: 'Voyez ce que dit Machiavel de la destruction de l'ancienne noblesse de Florence'. The pattern is clear and it will continue. Montesquieu is confident of his principles, confident in his use of sources, believes that his theories are both true and original, and that other historians, in so far as they differ from him, are mistaken.

After considering the causes which led to the disappearance of any general system of civil law in France, he comes to the general re-establishment which took place under the third race, the Capetians. He is now obliged to find new sources. The collection of *Capitularia* by Baluze comes to an end at the beginning of the tenth century, before Capetian times. Duchesne's *Historiae Francorum scriptores* continues to the reign of Philippe III (1270-1285), son of Saint Louis, but the collection seems to be very incomplete. For example, though two lives of Saint Louis by Dominican friars are given, the excellent life by Joinville is omitted. The *Recueil des historiens* was intended to remedy the deficiencies of Duchesne and bring the collection up to date, but unfortunately, before the publication of *De l'esprit des lois*, only five volumes of the *Recueil* had appeared and these only took the story up to the reign of Charlemagne. Another consideration is that, as written French begins to supplement or replace Latin, some glossary for the old French language would be desirable in addition to that of Du Cange for the later Latin language.

At this point Montesquieu's legal training and experience stood him in good stead. The revival of Roman law was paralleled by the compilation in written form of customary law. It was necessary in the eighteenth century for those in

[6] G. W. Leibniz, *Essai sur l'origine des Français*, in the *Recueil de diverses pièces sur la Philosophie, la Religion naturelle, les Mathématiques etc.*, ed. Des Maizeaux (Amsterdam 1720).

legal practice to be acquainted with both types of law, as well as with royal decrees and the case law developed by the *parlements*. The documentation which relates to the history of civil law under the third race covers all these aspects. The text itself is a relatively brief analysis of developments. Montesquieu wants to show continuity in the spirit of the law. He refers back briefly to the organisation of Barbarian peoples in Germany before they invaded other lands, and he continues to make frequent references to the Barbarian codes of law written down at various times after the invasions. In addition a new and very important element now appears, which consists of early compilations of customary law. These are considered in some detail with just an occasional reference to the 'ordonnances' and 'chartres' issued by the kings and to the provisions of canon law. There is also a brief discussion of the evolution of the laws as the feudal system changed and of the role played by the *parlements*.

For the early history of the German tribes, Montesquieu continues to refer to Tacitus – *De moribus Germanorum*, with a brief glance in chapter 17 at Velleius Paterculus. For the codes of law he continues to use Lindenbrog and Muratori, with the occasional reference to Cassiodorus, Marculf, Gregory of Tours and the *Capitularia* compiled by Baluze. In chapter 17 entitled 'Manière de penser de nos pères', in which he considers the strange fact that for centuries single combat was accepted as a method of deciding affairs of justice, he is using the reflexions he had entered in the *Pensées*[7] after having read *Mœurs et coutumes des Français* by Louis Legendre, published in 1712. After this he turns to a completely new set of sources in connection with customary law. The most important of these is the 1668 edition by Du Cange of the *Histoire de Saint Louis* first composed by the Sieur de Joinville in 1308, to which was added the *Etablissements de Saint Louis* and the *Conseil à un ami* of Pierre de Fontaines. He borrowed the work from the Academy of Bordeaux and the Bibliothèque du roi. The *Etablissements*, which date from about 1272/3, and the *Conseil à un ami*, composed about 1253 are amongst the earliest collections of customary law. He also acquired in 1746/7 for his own library at La Brède another private 'coutumier' contemporary with the other two. This was *Les Coutumes de Beauvaisis* composed about 1280 by Beaumanoir. The edition of 1690 at La Brède was by Thaumas de La Thaumassière. Another work by Thaumassière acquired at the same period was the *Anciennes et nouvelles coutumes locales de Berry et de Lorris*. Already in the library at La Brède was another work on customary law, the *Somme Rurale*, by Jean Boutillier in the edition of 1603 by Louis le Caron or Charondas. Montesquieu considers the *Etablissements de Saint Louis* as the most influential of these compilations because it was attributed to the king and certainly applied in the king's own domain, but he frequently refers to the others also, to illustrate particular points.

Royal authority was also exercised by decrees of various kinds. In references to the decrees enacted in the Capetian period the *Capitularia* of Baluze are replaced by other collections. The major work here is the *Ordonnances des rois des France de la troisième race*, a collection which was begun by Eusèbe de Laurière. The first seven volumes were published from 1723 to 1745. A collection of

[7] *Pensées*, Nagel ii (1540), 443-5; Pléiade i (1953), 1473-5.

'chartres' is in the *Nouvel examen de l'usage des fiefs en France* by Brussel, first published in 1727, which Montesquieu borrowed from the Bibliothèque du roi in 1747. Other 'chartres' are included in the work by Galland entitled *Du Franc-aleu*; the 1637 edition was added to La Brède in 1746/7.

A good example of the use of these new sources is to be found in chapter 29. The subject is the division of lands and legal authority in feudal times. It is explained that:

> Il faut savoir que la France était pour lors divisée en pays du domaine du roi, et en ce qu'on appelait pays des barons, ou en baronnies; et, pour me servir des termes des Etablissements de Saint Louis, en pays de l'obéissance-le-roi, et en pays hors l'obéissance-le-roi. Quand les rois faisaient des ordonnances pour les pays de leurs domaines, ils n'employaient que leur seule autorité; mais, quand ils en faisaient qui regardaient aussi les pays de leurs barons, elles étaient faites de concert avec eux, ou scellées ou souscrites d'eux; sans cela, les barons les recevaient, ou ne les recevaient pas, suivant qu'elles leur paraissaient convenir ou non au bien de leurs seigneuries . . .

The authorities given are Beaumanoir, Défontaines (P. de Fontaines) and the *Etablissements*, Liv.II. ch.10, 11, 15 'et autres', and a further note says:

> Voyez les ordonnances du commencement de la troisième race, dans le recueil de Laurière, surtout celles de Philippe-Auguste sur la juridiction ecclésiastique, et celles de Louis VIII sur les Juifs; et les chartres rapportées par *M. Brussel*, notamment celles de Saint Louis sur le bail et le rachat des terres, et la majorité féodale des filles, t.ii, liv.III, p.35, et, ibid, l'ordonnance de Philippe-Auguste, p.7.

Montesquieu's theory here is that the codification of customary law and the revival of Roman law started the trend towards a general system of justice for the country. Though France still in his time was divided into 'pays de droit écrit' (based on Roman law) and 'pays de droit coutumier', the customary law was much influenced by Roman law and the case law based on Roman law had regard to customary law. The jurisdiction of the *seigneurs* fell into disuse and was replaced by other courts, particularly those of the *parlements*: 'Tout cela se fit peu à peu, et par la force de la chose. La connaissance du droit romain, des arrêts des cours, des corps de coutumes nouvellement écrites, demandait une étude dont les nobles et le peuple sans lettres n'étaient point capables' (*Lois*, XXVIII, 43). This is the final part of the long process, the development of civil laws in France, studied in Book XXVIII.

A few new authorities are brought forward. First there is a work entitled *Treize livres des parlements de France* by Bernard de La Roche-Flavin, published in 1621. Montesquieu cites this work once or twice to illustrate the development of the jurisdiction of the *parlements*. He also uses in this connection a work which he possessed at La Brède entitled *Recueil des rois de France, leurs couronne et maison* by Tillet. This was first published in 1580 but the latest 1618 edition was at La Brède. In connection with the *parlement* of Paris, there is a reference to the compilation of its decisions from the year 1254 begun by Jean de Montluçon and known as *Olim*. At this point Montesquieu finds the opportunity to pay a tribute to 'l'excellent ouvrage de M. le président Hénault'. This was the *Nouvel abrégé chronologique de l'histoire de France* published in 1744. Towards the end of Book XXVIII, in chapter 41, there is a reference to the *Glossaire du droit français* published in 1704 by Laurière, based on Ragueau.

It may be helpful now to summarise the new sources used in connection with the development of civil law under the third race. They include several collections of customary law, notably the *Etablissements* of Saint Louis, collections of 'ordonnances' and 'chartres' issued by the kings, and works concerned with the development of law by the *parlements*, notably the collection of decisions of the *parlement* of Paris. A glossary of French legal terms almost completes the list. Once again one wonders about other historians, but although Montesquieu goes to them for factual information to illustrate the state of the law at particular times he still seems to be working out his own theories rather than reproducing those of other writers. He uses Joinville's *Life of Saint Louis* and the commentary by Du Cange in connection with the *Etablissements*, though as we have seen, he disagrees with Du Cange about the significance of this code; he mentions the work of La Roche Flavin but only to establish one or two details; there is just a word of approval (added in the 1757 edition) for Hénault's account of the *Olim* and that is really all. The documents themselves are what matter and almost all the references are to them.

Montesquieu leaves the subject with one final reflexion, drawn from his reading of the *Spectator*: 'Je suis comme cet antiquaire qui partit de son pays, arriva en Egypte, jeta un coup d'œil sur les pyramides, et s'en retourna' (*Lois*, XXVIII, 45).

I think we may add that this particular traveller's 'coup d'œil' took in a great deal, and that his journey in time and space was not wasted.

7. *De l'esprit des lois.* Books xxx and xxxi: sources

Books xxx and xxxi are concerned with the relationship between feudal law, and the establishment and changes in the monarchy in France. Their subject matter is an outline or theory of the development of the French constitution. In choosing this topic with which to end his great work on the spirit of the laws, Montesquieu was consciously taking part in a topical 'great debate'. The rights, privileges and duties of the king, and the place occupied in the state by the nobility, the clergy and the third estate, were argued back and forth in the seventeenth and eighteenth centuries in France until the revolution begun in 1789 brought about a fundamental change in the constitution. As in book xxviii, Montesquieu buttresses his own arguments by constant references to the documents. Most of his sources have already been mentioned in Book xxviii, but it is interesting to see the use he makes of them in this different context.

In the first chapter of Book xxx the subject of the feudal laws is introduced and while we are advised not to expect a full treatment – 'Ceci demanderait un ouvrage exprès', we must also realise that Montesquieu is setting out a view of the origins of the constitution which he regards as quite fundamental to an understanding of the historical development of the French state: 'C'est un beau spectacle qui celui des lois fëodales. Un chêne antique s'élève; l'œil en voit de loin les feuillages; il approche, il en voit la tige; mais il n'en aperçoit pas les racines: il faut percer la terre pour les trouver.' In other, and less elegant, terms, we are going on a digging expedition.

According to Montesquieu the essential characteristics of the feudal system can be found in the organisation of Barbarian tribes before they came out of Germany. His main sources for the description of this primitive organisation are Caesar – *De bello gallico* and Tacitus – *De moribus Germanorum.* He finds a strong resemblance between this society, which existed in Germany just before and during the first century A.D., and that which is revealed by the Barbarian codes of law as existing in various parts of Europe four centuries later: 'Ces deux auteurs se trouvent dans un tel concert avec les codes des lois des peuples barbares que nous avons, qu'en lisant César et Tacite on trouve partout ces codes, et qu'en lisant ces codes on trouve partout César et Tacite.' The first few chapters of Book xxx are composed of quotations from these authors and a commentary showing the continuity between the society they describe and society in the time of the Merovingian kings. There is a reference to the history of Gregory of Tours and to the life of Dagobert (Duchesne t.i; *Recueil des historiens*, t.ii).

From chapter 5 onwards we come to a consideration of land tenure after the invasions. The invasions by the Franks, the Goths and the Burgundians took place at different times and over different parts of Western Europe, including France. The records show that where the Goths and the Burgundians established themselves a division of lands took place between them and the previous inhabitants, but there is no such definite record in the case of the Franks. Montesquieu sees no justification for the assertion made by some writers (no

doubt he is thinking of Boulainvilliers) that the Franks, when they entered Gaul, took possession of all the land and turned it into fiefs. He refers again to Procopius (previously mentioned in Book XXVIII) and to Zosimus, historian of the later Roman empire, in connection with the Gothic wars and, for comparison, the wars against the Vandals. He continues to use the *Codex Legum* for the laws of the Franks, the Goths and the Burgundians, and there is a reference also to the *Chronicle of Marius*. This chronicle, which covers the period 455 to 581 is found in Duchesne t.i and the *Recueil des historiens* t.ii.

The line of argument from chapter 5 to chapter 9 goes like this: the Goths and the Burgundians made a division of lands between themselves and the previous inhabitants of the lands they entered. The records, including the laws of these two peoples, do not substantiate the theory that they took all or even most of the land into their own possession. The records of the Franks, including the Salic and Ripuarian laws, do not speak of any division of lands made by the Franks with the previous inhabitants and there is no reason to suppose that they, any more than the other Barbarian peoples, took possession of all the land. It is an argument taken, so far as the Franks are concerned, not from written evidence but from the lack of it and from an inference, which seems justifiable, that the Franks did not need or wish, any more than the Goths and the Burgundians, to take legal possession of all the land in the country they invaded. Two quotations sum up the line of thought (*Lois*, XXX, 7, 8):

> Les Francs ne suivirent pas le même plan [as the Goths and the Burgundians]. On ne trouve dans les lois saliques et ripuaires aucune trace d'un tel partage de terres. Ils avaient conquis, ils prirent ce qu'ils voulurent, et ne firent de règlements qu'entre eux.
>
> Les Francs agirent avec la même modération que les Bourguignons; ils ne depouillèrent pas les Romains dans toute l'étendue de leurs conquêtes. Qu'auraient-ils fait de tant de terres? Ils prirent celles qui leur convinrent, et laissèrent le reste.

In chapters 10 and 11, entitled 'Des servitudes', the discussion turns from the ownership of land to the ownership of people. The argument is that both before and after the invasions, society in France was made up of nobles, freemen and serfs. The Barbarian codes of law distinguish one people from another but also recognise differences of rank within each people. In chapter 10, which deals with the period of invasion, the method of substantiating the argument is similar to that followed when the division of land was in question. The detailed references are to the code of the Burgundians, and Montesquieu then adds: 'Il n'y a qu'à ouvrir les lois saliques et ripuaires, pour voir que les Romains ne vivaient pas plus dans la servitude chez les Francs que chez les autres conquérants de la France.'

However in chapter 11, Montesquieu deals with the fact that a few centuries later, the feudal system had spread all over France and men were divided into *seigneurs* and serfs. He traces the causes of this development to the continual wars, largely the result of strife between members of the ruling families, and to the accepted 'droit des gens' which decreed that conquerors had rights over the lives and property of those whom they conquered. The first invaders took what they wanted and left the rest: 'Le corps entier de l'histoire prouve qu'après le premier établissement, c'est-à-dire après les premiers ravages, ils reçurent à

composition les habitants, et leur laissèrent tous leurs droits politiques et civils.' However the 'premiers ravages' were only the beginning: 'La conquête ne fut que l'affaire d'un moment; et le droit des gens que l'on y employa, produisit quelques servitudes. L'usage du même droit des gens, pendant plusieurs siècles, fit que les servitudes s'étendirent prodigieusement.'

In support of his theory Montesquieu goes on from the Codes of Law to the history of Gregory of Tours, the letters of Cassiodorus and to various early chronicles or lives (*Annals of Fulda*, *Annals of Metz*, the *De gestis Longobardorum* of Paul the Deacon, the lives of various saints and the *Historia Francorum* of Aimoin) most of which are found both in Duchesne tomes ii and iii and in tomes ii and iii of the *Recueil des historiens*, though a separate edition of Aimoin is also in the library of La Brède. These sources contained a good deal of fabulous material (many early chronicles purporting to start from the beginning of the world), but they were the best available. A good appreciation of their value is contained in dom Bouquet's prefaces to the individual volumes of the *Recueil*. On the whole it appears that Montesquieu made prudent use of the most reliable sources, and understood that something of value can be gleaned even from those which are naive and credulous. It is amusing to see how carefully he mentioned the Lives of the Saints, with a comment framed to avoid offending the Church: 'Quoiqu'on puisse reprocher aux auteurs de ces vies d'avoir été quelquefois un peu trop crédules sur des choses que Dieu a certainement faites si elles ont été dans l'ordre de ses desseins, on ne laisse pas d'en tirer de grandes lumières sur les mœurs et les usages de ces temps-là.'

As Jean Brethe de La Gressaye comments: 'Les textes cités par Montesquieu n'apportent pas des preuves précises' (*Lois*, xxx, note 19). It may however be doubted whether precise proof is possible for a theory of developments spread over several centuries and probably historians would not quarrel with the main idea which is that the feudal system developed gradually and did not come into existence as the direct result of the Frankish invasions. It is noteworthy that Montesquieu does not, like Boulainvilliers, suggest that throughout this period the victors who became *seigneurs* were always of Germanic stock and the vanquished who became serfs were always of Gallo-Roman stock.

On the other hand he does not follow Dubos in thinking there was no genuine break between Gaul as a province of the Roman Empire and the kingdom of the Franks in Gaul, ruled by Clovis. In chapters 12 to 15, he quarrels with Dubos on the question of the payment of taxes under the two régimes. Against the author of the *Histoire critique de la monarchie française* he refers several times to Gregory of Tours and Codes of Law, and also makes extensive use, for the first time in this book, of the *Capitularia* of Baluze. In chapter 15 alone there are twenty-one specific references to capitularies or edicts. There is also a reference to the formulas of Marculf for the first time in this book. It is not possible to enter into the argument here. All we can do is note that Montesquieu did not lightly disagree with Dubos but produced quite literally chapter and verse for his own opinions. It is perhaps a tribute to Dubos that he provoked Montesquieu into this display of learning, but nothing could be more foreign to the author of *De l'esprit des lois* than the diffuse periods of the *Histoire critique*, and chapter 15 closes with an apology to the reader:

Je supplie le lecteur de me pardonner l'ennui mortel que tant de citations doivent lui donner: je serais plus court si je ne trouvais toujours devant moi le livre de *L'Etablissement de la monarchie française dans les Gaules*, de M. l'abbé Dubos. Rien ne recule plus le progrès des connaissances qu'un mauvais ouvrage d'un auteur célèbre parce qu'avant d'instruire il faut commencer par détromper.

Montesquieu now turns in chapter 16 to the special position of the *seigneurs*. As we have seen in a previous chapter, he considers the social institution of a special class of people who are particularly close to the king, who fight for him and are rewarded directly by him, as a continuation of the type of society depicted by Tacitus in the *De moribus Germanorum*. It is significant that, while he claims that the institution went back to the earliest days of French society, and that in course of time a special class of hereditary landowners came into being, he stresses that at first the institution was fluid; lands were not given in perpetuity and could even be taken away by the king during the lifetime of the holder. His authorities are the Salic and Ripuarian laws and the laws of the Lombards, Marculf, Gregory of Tours, a further reference to the *Annals of Metz* and the lives of the Saints and one new source – the *Livres des fiefs* or *Libri feudorum*, which are contained in the *Corpus Juris civilis*. These are in two parts. The first is now attributed to an unknown author writing between 1095 and 1136. The second is made up of two letters from Obertus ab Orto, Consul of Milan, to his son Anselm, probably written about 1155. Jean Brethe de La Gressaye comments that these works concern the customs of Lombardy and are not a very sure guide for French law. No doubt this is so, but Montesquieu frequently uses the laws and customs of other European countries and particularly Lombardy, to help interpret the situation in France. He uses the commentary by Jacques Cujas as a guide to the *Livres des fiefs*.

The next chapter, number 17, is devoted to the question of military service, which was one of the binding forces of feudal society. Montesquieu traces the development of the obligation of military service alongside the development of the feudal system. By the time of Charlemagne and his son Louis the Pious, the texts show that those who held land directly from the king served under him, those who held land as dependants of another *seigneur*, served under the *seigneur*, and the freemen who neither held land (whether from the king or an intermediate *seigneur*) nor were serfs attached to the land, served under the Count who was the king's officer. Even ecclesiastics who held lands in fief had an obligation to lead troops in military service until in the time of Charlemagne they were allowed to provide substitutes. Many capitularies are quoted to illustrate these arrangements. Montesquieu argues correctly that Dubos was wrong in asserting that when the capitularies speak of dependants of particular *seigneurs* the term applies only to serfs. He sums up the position thus: 'On peut donc dire qu'il y avait trois sortes de milices: celles des leudes ou fidèles du roi, qui avaient eux-mêmes sous leur dépendance d'autre fidèles: celle des évêques ou autres ecclésiastiques, et de leurs vassaux; et enfin celle du comte, qui menait les hommes libres.'

The second binding force within feudal society was the administration of justice. The argument in chapter 18 is that, just as military service was bound up with the possession of land, so too was the administration of justice: 'aussi

voyons-nous, dans tous les temps, que l'obligation de tout vassal envers son seigneur, fut de porter ses armes et de juger ses pairs dans sa cour.'

The way in which the judicial system worked in feudal times is discussed in some detail in this chapter. Many of the same sources of reference recur – the capitularies, Gregory of Tours, the formulas of Marculf. There is a reference to the 'glossaire des lois anglaises' found in the collection of William Lambard *De priscis Anglorum legibus*[1] and also to the *Chronicle of Frédégaire* which is in Duchesne t.i and the *Recueil des historiens* t.ii. Montesquieu finds some difficulty about this system in which military, judicial and even financial powers of taxation were combined in one centre: 'chose que j'ai dit, dans les livres précédents, être une des marques distinctives du despotisme'. He thinks however that the system was still moderate and not despotic because, firstly, the person who was responsible for judging never arrived at his decisions alone but was always helped by a number of others; secondly, the fiscal powers were very simple, and thirdly, the existence of codes of law was a safeguard against maladministration. This leads on, in chapter 19, to a discussion of the laws and customs of the Germanic peoples. Montesquieu refers to Tacitus for the early period, before the invasions, and to Gregory of Tours and capitularies of Charlemagne for the period after the invasions, but his main source of reference is the codes of laws themselves. He refers in this chapter to the Salic law and to the laws of the Ripuarians, the Frisians, the Angles, the Bavarians, the Alemanni, and the Saxons. No doubt his references are usually drawn from the *Codex Legum* and, in the case of the Law of the Lombards, from Muratori's *Rerum italicarum Scriptores*, but there is also another passing mention, in a footnote, of Lambard's *De priscis Anglorum legibus*. The theme of the chapter is that the Germanic peoples, at the time when Tacitus wrote, were in a 'state of nature' so far as the administration of justice was concerned. Only two crimes were punishable by the state – treachery and cowardice. Satisfaction for other crimes was due only to the injured person or his relatives. This custom received legal sanction in the codes of law when they were drawn up, and the satisfactions, which were called compositions, were described in terms of money, though often paid in kind, and the same laws frequently fixed the money value of livestock and goods for this purpose. In course of time it became a crime to exact vengeance after receiving satisfaction or to refuse to receive or refuse to pay the satisfaction prescribed by law. Private feuds were seen to be a threat to the state and so were punished by the state. One passage with Montesquieu's own footnotes, is worth quoting at length to show the theory and the extent of the documentation:

> On conçoit que celui qui se vengeait après avoir reçu la satisfaction, commettait un grand crime. Ce crime ne contenait pas moins une offense publique qu'une offense particulière: c'était un mépris de la loi même. C'est ce crime que les législateurs (a) ne manquèrent pas de punir.
>
> Il y avait un autre crime qui fut surtout regardé comme dangereux (b), lorsque ces peuples perdirent dans le gouvernement civil quelque chose de leur esprit d'indépendance, et que les rois s'attachèrent à mettre dans l'Etat une meilleure police; ce crime était de ne vouloir point faire, ou de ne vouloir point recevoir la satisfaction. Nous voyons, dans

[1] In an edition of Bede, the *Ecclesiastical history* and the *Anglo Saxon chronicle* (Cambridge 1644).

divers codes des lois des Barbares, que les législateurs (c) y obligeaient. En effet, celui qui refusait de recevoir la satisfaction, voulait conserver son droit de vengeance: et c'est ce que les gens sages avaient réformé dans les institutions des Germains qui invitaient à la composition, mais n'y obligeaient pas.

Notes: (a) Voyez la loi des Lombards, Liv I, tit.XXV para 21; ibid. Liv I, tit.IX paras 8 et 38, et le capitulaire de Charlemagne, de l'an 802, ch.XXXII, contenant une instruction donnée à ceux qu'il envoyait dans les provinces.

(b) voyez dans Grégoire de Tours, Liv.VII, ch.XLVII, le détail d'un procès où une partie perd la moitié de la composition qui lui avait été adjugée, pour s'être fait justice elle-même, au lieu de recevoir la satisfaction, quelques excès qu'elle eût soufferts depuis.

Voyez la loi des Saxons, ch.III, para.4; la loi des Lombards, Liv.I, tit.XXXVII, paras 1 & 2; et la loi des Allemands, tit.XLV, paras 1 & 2. Cette dernière loi permettait de se faire justice soi-même sur le champ et dans le premier mouvement. Voyez aussi les capitulaires de Charlemagne, de l'an 779, ch.XXII, de l'an 802, Ch.XXXII, et celui du même, de l'an 805, ch.V.

In the following chapter 20, this theory of the history of administration of justice is further developed. Montesquieu's ideas are original but coherent:

Chez ces nations violentes, rendre la justice n'était autre chose qu'accorder, à celui qui avait fait une offense, sa protection contre la vengeance de celui qui l'avait reçue, et obliger ce dernier à recevoir la satisfaction qui lui était due: de sorte que, chez les Germains, à la différence de tous les autres peuples, la justice se rendait pour protéger le criminel contre celui qu'il avait offensé.

The offender paid for the protection. The codes of law call the payment 'fredum'. Montesquieu defines this as 'la récompense de la protection accordée contre le droit de vengeance'. Jean Brethe de La Gressaye comments that the 'fredum' might also be regarded as a fine for having broken the peace and there can be little doubt that in time that was what it became. However, the origin of this payment may well be as described by Montesquieu.

The theory is used from chapters 20 to 22 to indicate how the right to administer justice was, from the beginning of Germanic institutions in France, attached to the grant of land 'Ce *fredum* était un droit local pour celui qui jugeait dans le territoire'. The documents show that 'celui qui jugeait dans le territoire' was he to whom the fief was granted, in modern terms the *seigneur*. The king gave up the right to administer justice and to receive the 'fredum', the profits of justice, within the lands granted in fief, and this right passed to the *seigneurs*. When lands were granted to the Church, the ecclesiastics likewise administered justice and received the 'fredum'. Again there is an imposing array of references: the codes of law, the *Capitularia*, Marculf, Du Cange, the lives of the Saints, the Council of Paris held in the year 615, and an interesting reference to the 'recueils de ces chartres, surtout celui qui est à la fin du cinquième volume des historiens de France des PP. Bénédictins' (*Lois*, xxx, 20) one of the few direct references to the *Recueil des historiens*. A small treatise by Loyseau, *Traité des justices de village*, is given a cursory dismissal.

The rights and wrongs of various theories concerning the origin and development of 'la justice des seigneurs' could be discussed at length, and more modern historians continue to do so.[2] Nevertheless the comparatively few pages in the

[2] For example, M. Bloch, R. Fawtier, F. L. Ganshof (see above, ch.2).

Lois devoted to the relationship between the monarchy and the administration of justice in the feudal system represent an original and valuable contribution to the debate.

The concluding chapters – numbers 23 to 35 – are devoted to a more detailed criticism of Dubos's *Histoire critique de l'établissement de la monarchie française dans les Gaules*. Montesquieu returns to the attack because Dubos was a noted scholar and his work had much influence but, as Montesquieu believed that it was based on false premises, he asserts that all the detail in the world could not demonstrate that the theory was true. The penetrating general criticism of the *Histoire critique* in chapter 23 deserves to be remembered whenever we are tempted to accept an interpretation of history merely because of the wealth of details adduced in its support:

> Cet ouvrage a séduit beaucoup de gens, parce qu'il est écrit avec beaucoup d'art; parce qu'on y suppose éternellement ce qui est en question; parce que, plus on y manque de preuves, plus on y multiplie les probabilités; parce qu'une infinité de conjectures sont mises en principe, et qu'on en tire comme conséquence d'autres conjectures. Le lecteur oublie qu'il a douté pour commencer à croire. Et, comme une érudition sans fin est placée, non pas dans le système, mais à côté du système, l'esprit est distrait par des accessoires, et ne s'occupe plus du principal. D'ailleurs tant de recherches ne permettent pas d'imaginer qu'on n'ait rien trouvé; la longueur du voyage fait croire qu'on est enfin arrivé.

Montesquieu's argument is really that Dubos does not bring any positive proof of what is an inherently unlikely theory, namely that the peoples of Gaul invited Clovis to take the place of the Roman Emperors and that he did so with the consent and support of Rome. Dubos supposes the truth of the matter to be so and interprets every detail of the surviving history of those times in the light of his theory. Montesquieu comments, and his argument is reasonable (*Lois*, xxx, 24):

> cependant, [M. Dubos] avait besoin, pour établir son système, de preuves bien fortes et bien précises. Car, quand on voit un conquérant entrer dans un état, et en soumettre une grande partie par la force et par la violence, et qu'on voit quelque temps après l'Etat entier soumis, sans que l'histoire dise comment il l'a été, on a un très juste sujet de croire que l'affaire a fini comme elle a commencé.

After this, a number of the events mentioned by Dubos are examined, to show that they can be understood quite simply in the context of the times concerned, without any need for a strained interpretation to fit the theory that the French monarchy was a legitimate successor to the Roman Empire. The last paragraph of chapter 24 begins: 'Je m'engagerais bien, en suivant la méthode de M. l'abbé Dubos, à prouver de même, que les Grecs ne conquirent pas la Perse'. In the rest of this quite short paragraph the boast is made good with an irony and economy of words which amount to a tour de force.

Chapters 23 and 24 deal with the insufficiency of the *Histoire critique*. No other sources are mentioned since Montesquieu has already documented his own theory. However, before letting Dubos go, he has one further quarrel to pick with him. This was on an issue which was of great and increasing relevance in their own day, the origins of the nobility. Dubos had argued that all the Franks were equal under the king, and he based himself on the Salic law. Montesquieu

disagrees with him; he appears to have been in the right, and he brings a wealth of documentation to prove his point. He shows that Dubos misunderstood the Salic law, and he refers extensively to this law, the law of the Ripuarians and the law of the Burgundians. Marculf is brought in, the *Capitularia*, particularly the edict of Childebert of 596 from which Dubos had also quoted, and finally the life of Louis the Pious by Tégan or Theganus (*De gentis Ludovici Pii Imp.*) which is found in Duchesne t.ii, but had not yet been reached in the *Recueil des historiens*. The historian Adrien de Valois (*Gesta Francorum* 1646-1658) is mentioned as a precursor of Dubos and is naturally dismissed.

Montesquieu's approach to this matter is worth remarking. It is plain from the tone of the chapter that his emotions are engaged. He does not want to believe that there was ever a time when the dominant nation in France admitted no distinction of rank under the king. The idea would not have suited his theory that monarchy with intermediate powers was in accordance with the spirit of the French constitution. However, though he is not indifferent, he certainly does not rely on assertion but on documentation. Moreover he does not make the mistakes of thinking that the nobility was an unchangeable order or that it was found only among the Franks and their descendants. Although he asserts that in early times the gift of land did not confer nobility, but was in fact conferred on families who were already noble in that they had a special relationship to the king, he also recognises that there were distinctions of rank amongst the Gallo-Romans as well as amongst the Franks and adds that he will show in the next book how 'par les circonstances des temps' it came about that free men could gain possession of land in fief and so be admitted to the ranks of the nobility: 'Cela n'était point ainsi du temps de Gontran et de Childebert, son neveu: et cela était ainsi du temps de Charlemagne'. Even though the spirit of the constitution persists, its institutions change because of time and circumstances. This applies to the nobility and to the other institutions which characterise the nation.

Looking back at Book xxx we can see that the objective is to trace the 'rapport' or relationship between, firstly, the organisation of the Germanic tribes, including the Franks and other tribes who invaded what is now France; secondly, the establishment of the Frankish monarchy in France and the immediate effect this had on the organisation of society of that period; and thirdly, the organisation of feudal society. Montesquieu sees a 'rapport' between the special companions who surrounded the king in the Germanic tribes, who were favoured with grants of land when the monarchy was established in France, and the complete feudal system in which all lands were held in fief either by *seigneurs* or by the Church. He sees the obligation to military service as intimately bound in with the organisation of society: the special companions serve the king in arms and are rewarded by him; the *seigneurs* also serve the king in arms and are responsible for raising armies who also serve the *seigneurs* and through them the king. Early German society recognised only two crimes punishable by the state; treachery and cowardice which threatened the state. Crimes between individuals became punishable later only in order to avoid the disruption to the state caused by private vengeance, and the criminal paid the state for the privilege of protection from private vengeance. The payments were made to and the protection extended

by the person who owned the land, and once lands were granted by the king, the administration of justice accompanied the grant of land.

The sources used are: Caesar and Tacitus for the description of German tribal society; the various codes of law and other enactments in Merovingian and Carolingian times taken from the *Codex Legum*, the *Capitularia*, the formulas of Marculf, the collections of charters and a few other sources such as the *Libri feudorum*; and a large number of histories, chronicles, annals, gestes and lives of very varied value, most of which were available both in the *Historiae Francorum scriptores* of Duchesne and in the *Recueil des historiens*, though some individual editions were also available in the library of La Brède. The more recent historians Loyseau and de Valois are briefly mentioned only to indicate where Montesquieu thinks they are in error, and he turns the full force of his critical powers and his sense of history against two nearly contemporary writers who had published work in the same field as his own, Boulainvilliers and Dubos.

When we come to book xxxi, the theme is the relationship between the development of the feudal system and the changes in the powers of the monarchy. The design is to show how the balance of power swung this way and that but the tendency, over the period of about one thousand years which he reviews, is to preserve a balance between the king and the 'nation'.

The first turning point or 'révolution' after the establishment of the monarchy in France is described in chapters 1 and 2. As we have seen, it was a struggle to establish a balance of power between the Crown and the land-holding nobility and it culminated in the edict of Pistes given at the Council of Paris in 615.[3] There are extensive references particularly to Gregory of Tours and the *Chronicle of Frédégaire* (Duchesne t.i, *Recueil des historiens* t.ii to t.v) and a passing reference to the life of Saint Léger in the same collections. The *Capitularia* of Baluze is used for the edict itself and for other edicts and charters.

After this turning point the forces which counter-balanced the monarchy gradually increased in power until the dynasty itself was destroyed and ultimately the institution of kingship was threatened, though it survived in a new form. There were two principal causes, each of which affected the other. Firstly the powers of the *maires du palais*, who were the king's administrators, increased greatly at the expense of the king, secondly, the tendency became more and more marked for lands, and rights of taxation and administering justice within the lands, to be granted in perpetuity; this meant that a class of *seigneurs* who were almost independent of the king came into being.

Chapters 3 to 6 deal with the rise to ascendancy of the *maires du palais*. Montesquieu relies on Tacitus, *De moribus Germanorum*, to show that a division of power between the king and the leader of the army was known in German tribal society. To chart the process of change which placed all powers with the *maires du palais* at the expense of the kings, he relies mainly on works he has already mentioned: – the *Chronicle of Frédégaire*, Gregory of Tours, Aimoin, the *Annals of Metz* and the codes of law. There is also the first reference to the valuable *Life of Charlemagne* by Eginhard, a contemporary of the great emperor, member of his court and secretary to his son, the future Louis the Pious. A copy

[3] See chapter 2 above.

of the 1521 edition of this work was in the library of La Brède and the *Life* is also in Duchesne t.ii and the *Recueil des Historiens* t.v. There is also a mention of the *Gesta Regum Francorum* found in Duchesne t.i. and the *Recueil* t.ii.

Chapters 7 to 10 deal with the second cause of the growing weakness of the Merovingian monarchy. The great offices of state (including the office of the *maire du palais*) and the grant of land, at first conferred for a time only, began to be granted for life and soon more and more of these offices and lands (whether the lands were granted outright or held as fiefs) became hereditary in a particular family. Montesquieu is dealing here with a process which took several centuries to become almost universal in France and which was a cause of division and weakness not only in Merovingian times but under succeeding dynasties. His sources are Gregory of Tours, the *Capitularia*, Marculf, the Salic and Ripuarian laws, Du Cange and the collection of charters in Galland's *Du Franc-aleu* which he had already used once in Book XXVIII (chapter 20). In connection with the clergy as holders of fiefs, he also uses the *Annals of Metz*, and makes his only references to the *Chronicle of Certulensus*, which covers the period 447 to 1088 and is found in tomes iii and v of the *Recueil des historiens*, but not in Duchesne.

This leads, in chapters 10 to 15, to a digression in which Montesquieu surveys the position of the clergy within the state, and especially the part they played in the feudal system. Though it is a digression in relation to his main theme of the relationship between the changes in the monarchy and the feudal laws, the subject is important and relevant because the Church was always a significant power in the realm. Just as the power of the monarchy waxed and waned, so did the wealth and influence of the Church though at different times and for different reasons. Piety induced certain kings, nobles and the people to build churches and make grants of lands and other goods. Fear, envy and the need to reward military prowess induced others to reduce the wealth and power of the Church. Eventually, after a period of disorder, Charlemagne regulated the position of the clergy and gave legal sanction to the payment of the tithes, thus giving the Church a secure position: 'La fameuse division (a) qu'il fit des dîmes en quatre parties, pour la fabrique des églises, pour les pauvres, pour l'évêque, pour les clercs, prouve bien qu'il voulait donner à l'Eglise cet était fixe et permanent qu'elle avait perdu. Note (a): de l'an 829, art. 7, dans Baluze t.i. p.663' (*Lois*, xxxi, 12).

In Chapter 15 the point of the discussion is reached. This is that the Church as landowner became part of the feudal system and exercised the same rights as other seigneurs.

The sources for this part of Book XXXI are very varied and some of them are new. A number of capitularies from the collection of Baluze are mentioned and a constitution of the year 834 which is found in the *Collectio constitutionum imperialium* by Goldast, published in 1713. Then there are the *Annals of Metz* again, Book I of the *Libri feudorum* and the commentary by Cujas, a 'diplôme' of Pepin, ancestor of Charlemagne, taken from the *Recueil des historiens* t.v, a capitulary taken this time not from Baluze or Goldast but from Eckhart's *Leges Francorum salicae et Ripuarum*, a reference to canon law from the appendix by le père Jacques Sirmond to the 1665 edition of the *Summa Conciliorum*, and a reference to the life of Saint Rémy. The footnote shows that this last is taken

not from Duchesne or the Recueil, but from the version by Surius in the collection of the Lives of the Saints by le père Simon Martin which is to be found in the la Brède library. There is also, in connection with Charlemagne's testament, a reference to 'une espèce de codicille, rapporté par Eginhard et qui est différent du testament même, qu'on trouve dans Goldaste et dans Baluze' (*Lois*, xxxi, 12).

Chapters 16-19 tell how the second 'révolution' culminated in the formal transfer of kingship from the Merovingians to the family of the *maires du palais* – Pepin (consecrated by the Pope in 754), and then Charlemagne and the Carolingian dynasty. The *Capitularia* of Baluze are much used but there is a reference again to the *Recueil des historiens* t.v. and Goldast; for a Council held in the year 890 there is a new source, t.i, of the *Corps universel diplomatique* by J. Dumont, published 1726.

In chapters 20-24, we come to Louis the Pious (son of Charlemagne) and the story of how the new dynasty gradually lost power within the feudal system and of the resulting confusion within the state and the Church. The *Capitularia* of Baluze are again the most important references, supplemented chiefly by the versions of the life of Louis the Pious in Duchesne t.ii. One of these versions is by Thégan and the other by an 'auteur incertain'. There are also references to the letters of Agobard to Louis the Pious (probably from the collected works at la Brède as this was the source in Book xxviii rather than Duchesne) and to other lives or chronicles which are in Duchesne t.ii. These include the history of Nithard, grandson of Charlemagne, which covers the period from the quarrels between the sons of Louis the Pious up to the year 843, a fragment from the chronicle of the monastery of Saint-Serge d'Angers for the reign of Charles the Bald, one of the sons of Louis the Pious, and a letter from Hincmar, Archbishop of Reims to Charles the Bald's son, Louis the Stammerer.

In chapters 25-31, Montesquieu treats in some detail the disastrous battle of Fontenoy between the three sons of Louis the Pious, the treaty of Verdun in 843 and the subsequent treaty of Meersen in 847, and all the causes which tended to strengthen the powers of the *seigneurs* and weaken those of the king. For comparisons he goes back to Gregory of Tours, but for the history of the Carolingian period he relies chiefly on the *Capitularia* of Baluze, the *Livres des fiefs* and the commentary of Cujas, and the *Ordonnances des rois de France* by Laurière. Nithard is mentioned again and a new author, the jesuit scholar Aubert le Mire, is introduced. The latter is just mentioned in connection with the pact of Bonn, in the year 926, which exemplified the weakness of the later Carolingian kings. Montesquieu comments: 'La branche qui régnait en France, et qui pouvait à peine disputer des villages, était encore moins en état de disputer l'empire.'

In chapter 32 Montesquieu describes how the monarchy was re-established in 987 when it was finally transferred to the holder of the largest fief, Hugues Capet, thus setting the monarchy within the context of the feudal system, which was in force all over France, and producing the conditions for gradual restoration of order. He gives no references, presumably because the event itself was so well known since it had established the still existing dynasty in France. His account is very short and he was mistaken in thinking that one reason for the choice of

Hugues Capet was that he alone was in a position to stem the Norman invasions, since these had ended when the invaders settled in Normandy and their duke became a vassal of the king by the Treaty of Epte in 911. This does not however invalidate the main theory proposed, namely that the union of the crown with the greatest fief was a 'révolution' or turning point in the evolution of the French constitution.

In the final chapters, 33 and 34, Montesquieu describes 'quelques conséquences de la perpétuité des fiefs', partly but not wholly in relation to the monarchy. For perspective he goes back to the two Frankish laws: the Salic law and the law of the Ripuarians, and his reference is as usual the *Codex Legum*. For the consequences themselves his references are mostly to sources he has already used: various Capitularies (Baluze), 'ordonnances' of Philippe-Auguste in 1209 and Saint Louis in 1246 (Laurière) the *Glossarium* of Du Cange, a charter quoted by Galland, the *Livres des fiefs* and the *Somme rurale* (Boutillier). His last two references are to legal decisions concerning marriage contracts and feudal inheritance. His authorities are collections of legal decisions of the *parlements* of Toulouse and Bordeaux known by the names of their first editors Aufréri and Boyer.

Once again, however much Montesquieu may have been influenced by what he read and by discussions with his colleagues, he follows his own independent line in setting out his theory of history, and his documentation is drawn entirely from original sources, though these had of course been printed and annotated. In this book he mentions only one other historian, le père Lecointe, and, as we saw in chapter 3 above, he mentions him only to disagree.

So we reach the end of *De l'esprit des lois*. In Book xxxi Montesquieu has traced the 'rapport' between, on the one hand, the powers exercised by the monarchy from the beginning of the Frankish kingdom of Clovis in 'les Gaules' up to the establishment of the Capetian dynasty and, on the other hand, the evolution of France as a fully feudal state with intermediate powers firmly established between the people and the throne. Since this book is concerned with developments during much the same period as in Books xxviii and xxx, inevitably many of the same sources are used. Much of the material in the references can be found in Duchesne and/or the *Recueil des historiens*, or in separate editions of works, such as those by Gregory of Tours, Marculf and Eginhard, which find a place in these collections. Also important are the *Codex Legum*, the *Capitularia* of Baluze and the *Glossarium* of Du Cange. After these come the works which are mentioned occasionally. We find again the *De moribus Germanorum* of Tacitus, the collection of charters in Galland's *Du Franc-aleu*, the *Livres des fiefs* or *Libri feudorum* in the *Corpus juris civilis* with commentary by Cujas, the *Ordonnances des rois de France* by Laurière and the *Somme rurale* by Boutillier. However, Montesquieu also mentions some sources for the first time. The references to the *Collectio constitutionum imperialium* by Goldast, published in 1713, and to the first volume of the *Corps universel diplomatique*, by Dumont, published in 1726, shows that he was at pains to keep his documentation for this last book up to date. For some telling details in the last chapter he refers for the only time to collections of legal decisions by Aufréri and Boyer. No contemporary historians are mentioned except for the slighting reference to le père Lecointe. Indeed,

though Montesquieu was writing against the clock, while Jacob Vernet in Geneva kept up the pressure on him to produce the last two books for the printers, he seems to have relied to the end on the documents and his own powers of interpretation rather than on any secondary sources.

8. Pre-Capetian period: evaluation of sources

MONTESQUIEU's account of the development of civil and constitutional law in France really starts from the time when the Merovingian dynasty, in the person of Clovis who reigned from 481 to 511, became firmly established as rulers over the greater part of what is now called France. Though he certainly knew, as we shall see, at least something of the controversy concerning the Frankish settlements in Gaul and about whether or not the Merovingian dynasty might be said to have existed before Clovis, he does not go into these questions, and he does not describe the immediately pre-Clovis period in France. Perhaps this is reasonable since it was only in the time of Clovis that a state which was something more than a province of the Roman Empire genuinely existed in France. Nevertheless the state did not establish itself in a vacuum; it was conditioned by the character of its two components: Germanic tribal society and Roman-Gallic society. Montesquieu does justice to the inter-action of the Barbarian codes of law and Roman law. He also of course argues in some detail that both Boulainvilliers and Dubos were mistaken in their view of the origin and nature of the French monarchy, but he bases his arguments, and the grounds for his own theory of a moderate monarchy with intermediate powers, on evidence from the documents which show how the laws actually worked in the time of Clovis and his successors. It is permissible to enquire why he does not give any historical account of pre-Merovingian times.

It is certain that he does not do so. His references to Caesar (*De bello gallico*), Tacitus (usually to the *De moribus Germanorum*), and the *History* of Velleius Paterculus, are not intended to throw light on the society which existed in Gaul before Clovis. Caesar, who wrote in the first century before Christ, and Tacitus and Velleius Paterculus who wrote in the first century after Christ, were separated by four or five hundred years from the time of Clovis. Their works are excellent source material, but not for the immediately pre-Merovingian period in Gaul. Montesquieu's only purpose in using them is to illustrate the nature of Germanic tribal organisation, which in his view was the germ or seed which eventually developed into the monarchy of France.

The probability is that he does not describe the society which existed in Gaul before Clovis, because this period, together with the questions of the dates which could be assigned to the earliest Barbarian invasions and the establishment of Frankish settlements and Frankish kings within Roman Gaul, had been extensively studied in the previous thirty or so years. The account of historical facts which, when first given by Nicolas Fréret in 1714, was regarded as not only questionable but dangerously unorthodox, was by 1738 accepted, at least by scholars, as established.

The 'succès de scandale' achieved by Fréret with the famous dissertation read to the Académie des inscriptions, on the subject 'De l'origine des Francs et de leur établissement dans les Gaules',[1] probably owed something to the combative

[1] Fréret, *Œuvres*, v.155 to end and vi.1-227.

way in which it was expressed, but a good deal more to the circumstances of the time. The printed text shows Fréret dismissing 'les modernes' in no uncertain fashion:

> les fables [e.g. that the Franks were descended from the Trojans] sont abandonnées de tout le monde ainsi que je l'ai observé, mais comme l'esprit humain semble fait pour donner toujours dans l'excès on s'est jeté depuis quelque temps dans l'extrémité opposée; et des écrivains célèbres ont cru que l'histoire et les antiquités de notre nation ne méritaient aucune créance avant le règne de Clovis; c'est au règne de ce prince qu'ils font commencer notre histoire; et ils supposent que jusqu'alors les Francs étaient des Barbares errants, sans demeure fixe et sans forme de gouvernement.

His dissertation is devoted to arguing that on the contrary the Franks had a fixed abode and a form of government in parts of France well before Clovis. He concludes, still in fighting mood and not pausing for a full-stop (*Œuvres*, vi.227):

> Ainsi lorsque Clovis mourut en 511 les Francs étaient maîtres de la Gaule entière, à l'exception de ce que les Bourguignons occupaient entre le Rhône et les Alpes, de la Provence, et de la partie méridionale de la Septimanie, et ils le possédaient en partie à titre de conquête avec les ennemis de l'Empire romain, et en partie par la concession formelle des empereurs, ou du moins par une approbation tacite qu'ils avaient faite des établissements qu'ils avaient formés dès les premiers temps, c'est-à-dire plus de 150 ans avant Clovis, pour ne dater que de la confirmation accordée aux Saliens en 358 par Julien, alors César, et depuis empereur; ce qui est bien différent du système imaginé par les modernes auxquels il a plû d'ôter à notre monarchie près de deux cents quatre-vingts ans de durée.

This dissertation was the first which Fréret read to the Académie des inscriptions, and it seems to have caused a stir. The first reading was on 14 November 1714 and it was repeated amid considerable interruptions on the 11 and 14 December 1714. Fréret was sent to the Bastille on 26 December of that year. It seems scarcely credible that, even under an absolute monarchy, investigation into events which took place more than a thousand years previously could result in imprisonment. Indeed the reasons for Fréret's arrest were not so simple nor, given the period, so incomprehensible. Until recently the best study of this matter was that made by m. Walckenaer, perpetual Secretary of the Académie des inscriptions et belles-lettres in his report to the Académie in 1850.[2] His work, and other relevant material, are used by Renée Simon in her important study of Nicolas Fréret.[3]

In 1714 Voysin became Chancellor of France. It was he who drew up the

[2] *Des manuscrits inédits de Fréret* (Paris 1850).

[3] R. Simon, *Nicolas Fréret, académicien* (see chapter 4 above, p.57). For the dissertation on the origin of the Franks and the affair of the Bastille imprisonment see pp.16-21 and 130-39. The quotations from the published version of the dissertation may well differ from Fréret's original lecture in 1714. Renée Simon says, p.134: 'Fréret n'avait d'abord donné, à la veille de son séjour à la Bastille, qu'une esquisse de sa dissertation. Il y travailla de nouveau dans les années suivantes [...] Il lut son nouveau traité, très long, du 16 décembre 1727 au 25 mai 1728, et treize séances y fut consacrées. Ce traité ne figure pas à cette date parmi les mémoires de l'Académie. Nous savons que Fréret omettait de déposer ses travaux au secrétariat de l'Académie, et qu'il se fit rappeler à l'ordre sur ce point; il continuait à les corriger ou à les enrichir de quelque nouvelle trouvaille sans se soucier de leur assurer quelque pérennité par l'impression.'

famous will by which Louis XIV, knowing that he had only a very young great-grandson, attempted to settle the government of France after his death and to prevent his nephew, the Duke of Orleans, from becoming regent. The power of great men dies with them and the Duke of Orleans did of course become regent in 1715 after Louis XIV's death, but Walckenaer ways that in 1714:

> Tout ce que nos annales pouvaient apprendre sur l'origine du pouvoir de nos rois, sur les droits de leurs enfants légitimes ou légitimés, des princes du sang, des pairs de France, du parlement, devenait d'une importance majeure dans la lutte qu'on prévoyait après la mort de Louis XIV: par cette raison on faisait alors attention à tout ce qui s'écrivait sur l'histoire de la France.

Fréret was in any case suspect because he came of a Jansenist family. The condemnation of Jansenism by pope Clement XI in 1713 by the issue of the Papal Bull 'Unigenitus' roused a fury of controversy in France. Fréret had links with the cardinal de Noailles who openly opposed both the pope and the king in the matter of the Papal Bull, forbidding the priests of his diocese to accept its terms, and issuing an interdict against the Jesuit priests who had accepted them. It was, in these circumstances, unfortunate that the Académie des inscriptions should choose to study the history of France, instead of occupying itself with ancient history; annoying to the government that Fréret, supposed to be inclined to Jansenism, should deliver the lecture; and unacceptable that he should attack the official account of the origins of the French monarchy as given by le père Daniel, a Jesuit, historiographer of Louis XIV and one of the 'moderns' decried by Fréret.[4] Voysin wrote to d'Argenson, lieutenant of police at Paris, on 26 December 1714 to order the arrest. Walckenaer quotes the essential part of the letter which is printed in full in *Histoire de la détention des philosophes* by Delort, ii.10. Fréret, says Voysin, is attached to the Jansenist party:

> ce qui n'est pas étonnant puisque sa mère est propre sœur de Lenoir de Saint-Claude, qui demeurait à Port-Royal-des-Champs, qui a été mis depuis, par ordre, à la Bastille [...] d'ailleurs, on le croit l'auteur de plusieurs libelles contre la *Constitution*, [i.e. the Bull 'Unigenitus'] et de faire des écrits et des mémoires sur plusieurs natures d'affaires. On me l'a aussi dénoncé comme ayant pris des mesures pour faire imprimer clandestinement et sans permission, un livre contre l'histoire de France de Daniel.

Fréret's imprisonment was neither long nor severe. Solitude was not a great evil for him, he had all the books and papers he wanted, and he seems to have profited from his enforced leisure to read again the principal Greek and Latin authors, make a number of extracts from works on chronology, history and geography, and to compose a Chinese grammar. He was freed after about four months and Walckenaer comments: 'Quand il sortit de prison, tous ses papiers lui furent rendus: son arrestation était plutôt une manifestation du mécontentement du Gouvernment contre l'Académie des inscriptions et médailles que contre lui personnellement, et elle ne servit qu'à le rendre plus cher à la compagnie, à laquelle il se dévoua tout entier.'

All the same, the state's displeasure had been marked and Fréret's work on

[4] Gabriel Daniel, *Histoire de France depuis l'établissement de la monarchie française dans les Gaules*, first published in 1713, reprinted in revised and enlarged editions in 1720 and 1755-60.

the origin of the Franks was not printed, or at least not openly published until the Septchênes edition of 1796-99, about fifty years after his death. Voysin's letter, referred to previously, says that he was denounced for having taken measures to have a book against Daniel's *History* printed clandestinely and without permission. The dissertation is scarcely a book but must surely be the work in question. Quite possibly some copies were printed, though the only evidence that I know of to support this possibility is that Montesquieu, writing probably in 1734 in the *Spicilège*[5] says 'Voici le plan d'une dissertation du sieur Fréret' and then follows a summary of the dissertation on the origin of the Franks. Montesquieu might have borrowed a manuscript copy or possibly one that was clandestinely printed, but it seems likely that, in any case, he was referring to the version of 1727 to 1728 rather than that of 1714.

However, whether or not Fréret's work had a wide circulation, interest in the topic certainly continued. Writing in 1739, in the preface to tome iii of the *Recueil des historiens*, dom Bouquet has no hesitation in disagreeing with Daniel's account of the date when the Frankish monarchy was established in Gaul. He summarises Daniel's opinion as follows (pp.xxxix-xl): 'Le père Daniel, si connu par son histoire de France, prétend que Clovis ne possédait aucune partie de ce qu'on appelle aujourd'hui le royaume de France avant qu'il eût conquis les états de Syagrius, et il retranche du nombre de nos rois les prédécesseurs de Clovis.' He then recounts the work of the Benedictine dom Lucon and of M. Biet in refuting Daniel and explains his own position (p.xl): 'Pour moi, il me suffit de marquer en abrégé ce que disent les Anciens, qui ait rapport à cette question, pour faire voir que l'opinion du P. Daniel est insoutenable.' He mentions his authorities among the ancient writers, including Zosimus, Cassiodorus, Jornandes and several others, and concludes (p.xliii):

> Quoiqu'entre les témoignages que je viens de citer il s'en trouve quelques'uns qui prouvent seulement que les Francs étaient venus dans les Gaules, et qu'ils y étaient arrêtés, si cependant on les prend tous ensemble, on en peut certainement conclure que les rois des Francs y avaient un établissement fixe et solide bien longtemps avant Clovis; surtout si à ces témoignages nous ajoutons ceux de Procope et de Grégoire de Tours qui ont traité la question et qui paraissent la décider.

Montesquieu had little incentive to go over ground already so well trodden. It must be admitted that he may also have been discouraged by the conclusion of dom Bouquet's preface to tome i of the *Recueil* (pp.lxxviii-lxxix) which points the reader firmly in the direction of Dubos's *Histoire critique de la monarchie française*:

> je renvoie le lecteur au livre premier de cet excellent ouvrage. On y voit quelle était dans les Gaules la condition du peuple au commencement du cinquième siècle; quel était le revenu des cités, de quelle manière elles étaient gouvernées, en quoi consistait leur milice. On y traite de leurs assemblées génerales, de l'autorité impériale dans les Gaules; des officiers que l'Empereur y envoyait tant pour commander les troupes, que pour rendre la justice, et administrer les finances; enfin des revenus que l'Empire Romain avait dans les Gaules, et en quoi ils consistaient.

Montesquieu did not dispute Dubos's accuracy in respect of facts but he did strongly dispute the conclusions drawn from those facts, so that he was not

[5] *Spicilège* 585 (ms pp.538-39), Nagel ii.854-5; Pléiade ii.1375-76.

likely to repeat dom Bouquet's commendation. No doubt, however, he acknowledged, if only to himself, that it would be a waste of time to do the work again. The period before Clovis was not strictly relevant to his own theories and, on the whole, apart from passing references, he just ignored it. It is only with the Merovingian period proper that his contribution to the understanding of French history begins.

The major part of his studies is concentrated in the five hundred years from the beginning of the reign of Clovis in the year 481 to the election of Hugues Capet as king in the year 987. He glances back from time to time, mainly through references to Tacitus and Caesar, to conditions in Roman Gaul and in German tribal society before the invasions into other parts of Western Europe. In Books xxx and xxxi he sometimes comments also on later developments, but only in Book xxviii on the civil laws is there a detailed examination of institutions or events later than the tenth century.

In trying to evaluate his sources it seems advisable to look next at this main period of five centuries during which France emerged from the 'kingdom of the Franks' etablished by Clovis in 'les Gaules'. It is surely not merely by chance that he concentrated on the centuries which by the first half of the eighteenth century, had already been most fully and carefully documented. It seems a fair guess, though only a guess, that he did not continue his study of the relationship between the monarchy and the feudal laws after the accession of Hugues Capet, partly because the textual evidence was not readily available, even to an intelligent and educated enquirer who was not a specialist in the field. Civil law was a different matter. Here he was on his own ground and knew enough to assemble his documentation from a number of quite separate sources.

To Montesquieu himself, the most important of all his sources for the main period of five centuries appears to have been the Barbarian codes of law. He had already given them some consideration in Book xviii: *Des lois dans le rapport qu'elles ont avec la nature du terrain.* In chapter 22 of this book he is considering Salic Law under the title 'D'Une Loi civile chez les Peuples Germains', and he mentions several of the other codes also, because, as he says, 'Les Lois de ces peuples barbares, tous originaires de la Germanie, s'interprètent les unes les autres, d'autant plus qu'elles ont toutes à peu près le même esprit' We know also from the *Pensées* that he had undertaken a study of these laws and had assessed their significance: 'En lisant les codes des lois des Barbares, je cherchais la jurisprudence dans son berceau.'[6]

Almost always, when a particular source of reference for the Barbarian laws, other than the law of the Lombards is mentioned, it is Lindenbrog (as we have seen, Montesquieu acquired his *Codex legum antiquarum*, published in Frankfurt in 1613, for his library at La Brède in 1738). This meant of course that it was easily available for reference and no doubt the notes in the *Pensées* were based on a study of the *Codex Legum.* It is likely however that it was not only for convenience that he habitually used Lindenbrog's collection in preference to the

[6] *Pensées*, Nagel ii (1937), 579; Pléiade ii (400), 1103. For an extended consideration of the character of these laws, see *Pensées*, Nagel ii (1826), 542; Pléiade ii (404), 1104.

later editions of some of the laws in the *Capitularia* of Baluze (1677) and the *Recueil des historiens* t.iv (1741).

As he had said in Book XVIII, and as he shows by his methods, the different codes help to interpret each other, and the full collection was available only in the *Codex Legum*. Nevertheless, he seems to have made an error of judgement in not drawing the attention of his readers to the editions in the *Recueil des historiens* of the four codes which had been followed in parts of France. In the *Recueil* the benefit of the latest scholarship had been applied to the versions of the Lex Salica, the Lex Ripuariorum, the Lex Burgundiorum and the Lex Wisigothorum. In particular, for the Lex Salica, whereas the *Codex Legum* contains only one version and that is of the law as revised by Charlemagne, the *Recueil* contains four. One is from a manuscript of the Abbey of Fulda, first printed in 1557 by Basile-Jean Herold but collated against the manuscript and reprinted at Frankfurt in a 'belle édition' by Eckhart in 1720. The second, given by Eckhart in the same edition for comparison, is from a manuscript in the library of the duke of Wolfenbüttel. (The 'belle édition' by Eckhart, the *Leges Francorum salicae et Ripuariorum* was added to the library at La Brède in 1746/7, so that Montesquieu certainly had access to it, though he does not refer to it directly, except once in Book XXXI, chapter 11 in connection with a capitulary added to the Salic Law). The third is from a manuscript in the Bibliothèque du Roi printed in 1727 in Schiller's *Antiquités Teutoniques*. The fourth is the revised version by Charlemagne, and here the *Recueil* uses the text by Baluze as the most correct since he had seen the editions by other scholars – Du Tillet, Pithou, Goldast, Lindenbrog, and Bignon are mentioned – and had collated the text against eleven manuscripts. It seems a pity that the readers of *De l'esprit des lois* were not directed to this wealth of erudition applied to what was for them (and probably for us) the most famous of the Barbarian codes of law, especially since we know from other references that Montesquieu himself used the *Recueil*. In mitigation we must remember that he had obviously made detailed notes on the codes long before he prepared the three historical books for printing, he was writing in haste and it would have been very time consuming to recheck all his references to the four French codes in the later editions.

The code mentioned most often, apart from the four French codes, is the law of the Lombards. Most of the references are not attributed to a specific publication, and there can be little doubt that Montesquieu studied the Lex Longobardorum with the other codes in the *Codex Legum*. He does, however, acknowledge another and later source for some of the references. This source is the Italian archivist Muratori (1672-to 1750) who published at Milan the *Rerum italicarum scriptores*. The collection is in 25 volumes, beginning in 1723. In the *Voyages* Montesquieu describes his visit to Milan in Lombardy beginning on 24 September 1728. During his stay in Milan he was conducted round the Ambrosian library and found it admirable. He notes:

> Outre le grand nombre de livres dont elle est remplie, elle contient une très grande quantité de manuscrits, qui seuls feraient une bibliothèque [...] Elle est extrèmement bien tenue. On voit qu'il y a eu des bibliothécaires savants. Le premier a fait, à la tête de chaque manuscrit, une note où il met l'âge du manuscrit, celui à qui il appartint,

celui qui l'a donné au Cardinal [Borromée], et les choses qui peuvent être particulières à chaque manuscrit.[7]

In the course of this part of the *Voyages* he mentions 'le recueil des historiens *Rerum italicarum*', and it seems probable that his specific interest in the history of Lombardy and its law dates from this period. He may have made extracts from the *Rerum italicarum scriptores* at the time, but we know also that he borrowed 8 volumes of this collection from the Bibliothèque du roi on 23 August 1747 and 19 January 1748.

He takes the opportunity in Book XXVIII chapter 6: 'Comment le Droit Romain se conserva dans le domaine des Lombards', to illustrate developments in Italy by a footnote reference to Machiavelli's *History of Florence*. Françoise Weil thought that he might have borrowed this work from the Oratorians or Barbot, but in fact it was contained in an Italian edition of Machiavelli's *Works*, published in 1726, which was acquired for the library at La Brède.

One additional source in connection with the codes of law is given in Book XXX, chapters 18 and 19. The particular law is that of the Angles or English, and the source is an edition of Bede's *Ecclesiastical history and Anglo-Saxon chronicle*, with additional material and a commentary by William Lambard. The work, which was acquired for the library at La Brede in 1746/7, is catalogued in the name of Bède le Vénérable. Its full title is: *Historiae ecclesiasticae gentis Anglorum libri V, cum chronologia saxonica, quibus accessere anglo-saxonias leges, et leges Henrici I*, published at Cambridge in 1644.

The next most important source used by Montesquieu for texts concerning the civil and constitutional laws of France is the *Capitularia regum Francorum* of Baluze, published in Paris in 1677. No later edition was published until 1780, so that the 1677 edition, which was probably borrowed from the Oratorians, was the most up to date available. Etienne Baluze (1630 to 1718) is always described as one of the 'grands érudits' of the period. He took minor orders and became in turn secretary to monseigneur P. de Lorca, archbishop of Toulouse and then of Paris, then secretary to the archbishop of Auch, and eventually librarian to Colbert from 1667 to 1700, during which time he published the *Capitularia*. No-one could have been better placed to assemble the material needed for this book. He held other important posts, and though a cloud was cast on his later career and he was banished for a time from Paris when he was found to have reproduced forged documents in connection with his book *L'Histoire généalogique de la maison d'Auvergne* (1710), undertaken at the request of the cardinal de Bouillon, his place in French historical studies is still recognised as extremely important, not only for his published work, but even more for the material he assembled for other scholars. In the *Dictionnaire des lettres françaises*, XVIIe siecle, there is the following appreciation:

Si importante que soit son œuvre, elle l'est moins que la collection personnelle de livres et surtout de manuscrits, qu'il avait formée en même temps qu'il achetait, pour Colbert, nombre d'importants manuscrits. Cette collection, qu'il légua à la fille et veuve de ses imprimeurs, Mme le Maire, fille de Fr. Muguet, fut acquise pour trente mille livres en 1719 par la Bibliothèque du roi. Le rôle de Baluze dans les lettres et l'érudition fut

[7] *Voyages*, Nagel ii.1164; Pléiade i.593-94.

considérable et la vigueur de son esprit est restée célèbre aussi que l'immensité de son labeur.

The article by A. Martin in the *Dictionnaire de biographie française* confirms this judgement. Martin concludes: 'En dépit de cette malheureuse affaire de Bouillon, où il fut plus victime que coupable, Baluze laissait à tous la mémoire d'un grand travailleur, d'un érudit probe et soigneux et aussi d'un homme bon et sympathique: tous ses papiers conservés aujourd'hui à la Bibliothèque nationale en font foi.'[8]

The *Capitularia* are published in two volumes. The first begins with some 'Capitularia veterum regum' from about the year 560 and continues to the reigns of Charlemagne and his son Louis the Pious. In addition to the capitularies of the kings, some other matters are included, notably the Lex Ripuariorum, the Lex Alamannorum, the Lex Baiwairorum and the Pactus Legis Salicae which is the version of the Salic Law revised by Charlemagne. In the second volume the capitularies reproduced are those issued within the relatively short period, about 844-867 by descendants of Charlemagne (including Charles II (the Bald), Louis II of France (the Stammerer), the emperor Lothair, Carloman of France, Charles III of France (the Simple) and Louis the German, king of Germany and later emperor), while the empire was in the process of disintegrating. The most important of the other early documents included in the volumes are the formulas of Marculf, with an appendix, and other formulas including the collections made by Sirmond and Jérôme Bignon. In addition there are a glossary of Pithou to the Salic Law and the capitularies, notes by Jérôme Bignon on the Salic Law and the formulas and Baluze's own notes to the capitularies and formulas. It certainly seems clear, therefore, that in using the *Capitularia regum Francorum* as an important source of information, Montesquieu had the benefit of the best critical appreciation available in Baluze's own time. However the work was published in 1677 and it is necessary to consider whether it had been superseded.

It seems certain that, in fact, the collection was still the best available. The next major endeavour in this particular field, that is, the publishing of the official acts and edicts of the kings of France, was a continuation rather than a replacement of the *Capitularia* of Baluze. This sequel was the *Ordonnances des rois de France de la 3e race*, which we shall consider when we get to the Capetian period. In Books XXX and XXXI, Montesquieu himself occasionally supplements Baluze by other references, but the works in question are certainly no substitute for the specialist collection.

In Book XXX, chapter 20, 'De ce que l'on a appelé depuis la justice des seigneurs', there is a reference to a charter of Charlemagne for the year 771, and the source is the *Thesaurus novus anecdotorum* of dom Edouard Martène. The author, who lived from 1654 to 1739, is described by J. Daoust as 'ce grand érudit mauriste', scarcely inferior to Mabillon and Montfaucon.[9] Daoust describes the work thus:

Dom Martène offrait, la même année (1717) aux érudits les cinq infolio du *Thesaurus novus anecdotorum* qui attestent son flair de chercheur et sa connaissance prodigieuse du

[8] *D.B.F.* (Paris 1933-), v.25.

[9] *D.L.F.* (Paris 1951-1973), XVIIIe siècle, pp.194-96.

passé. Il avait réuni dans cet ouvrage des lettres et diplômes de hauts personnages, des chroniques et des documents d'histoire, des décrets conciliaires, synodaux et capitulaires, ainsi que des opuscules de divers auteurs ecclésiatiques, bref, comme l'indique le titre, un vrai trésor qu'il mettait ainsi à la disposition des historiens.

This is one of the works which Montesquieu is known to have borrowed from the library of the Academy of Bordeaux, probably in 1743.

In Book XXXI, there are a number of other supporting references. In chapter 11, 'Etat de l'Europe du temps de Charles Martel', which concerns the state of the church under Charles Martel, Charlemagne and their successors, there is reference to several capitularies in Baluze's collection and then to 'Le capitulaire de Pépin, roi d'Italie, où il est dit que le roi donnerait en fief les monastères à ceux qui se recommanderaient pour des fiefs. Il est ajouté à la loi des Lombards liv.III, tit.i, para 30, et aux lois saliques, recueil des lois de Pépin dans Echard, p.195, tit.XXVI, art.4'. The allusion is to Eckhart's *Leges Francorum salicae et Ripuariorum*, which we have noticed previously.

From chapter 12 onwards there are a few references to the *Collectio Constitutionum et Legum imperialium* published in Frankfurt, 1614, of M. Goldast, a Swiss lawyer. Goldast lived from 1576 to 1635.[10] The work was not at La Brède, but Montesquieu could have obtained it from the Oratory library. His references are in connection with the testament of Charlemagne (this is in addition to Baluze) and with certain agreements drawn up by Charlemagne and Louis the Pious with their respective heirs.

In Book XXXI, chapter 17: 'Chose particulière dans l'élection des rois de la seconde race', there is reference to 'les actes du concile de Valence, tenu l'an 890, pour l'élection de Louis, fils de Boson, au royaume d'Arles. On y élit Louis, et on donne pour principales raisons de cette élection qu'il était de la famille impériale, que Charles le Gros lui avait donné la dignité de roi, et que l'empereur Arnoul l'avait investi par le sceptre et par le ministère de ses ambassadeurs'.

The authority here is the *Corps universel diplomatique du devoir des gens ou Recueil des traités de paix depuis l'Empereur Charlemagne jusqu'à présent* by Jean Dumont, published 1726-31. Dumont himself lived from 1667 to 1727 and became 'conseiller et historiographe' to the emperor Charles IV at Vienna. He was the author of several works. The *Corps universel diplomatique* was continued after his death by J. Rousset and is still well regarded. Montesquieu borrowed this work from the Academy of Bordeaux, probably in 1743, and again from the Bibliothèque du roi on 30 January 1747.

Still in this chapter, he supplements Baluze and Goldast with other references, including the only reference to Canisius or Henri de Hondt:

Pépin, se sentant près de sa fin, convoqua les seigneurs ecclesiastiques et laïques à Saint Denis (l'an 768); et partagea son royaume à ses deux fils Charles et Carloman. Nous n'avons point les actes de cette assemblée; mais on trouve ce qui s'y passa, dans l'auteur

[10] See article on Goldast, N.B.G. (Paris 1857-1866), 46 vols, xxi, pp.91-93. The author writes: 'Ses nombreux ouvrages renferment des matériaux pour l'histoire politique de l'Allemagne. Ils ont singulièrement facilité l'étude du droit public de l'empire.' He adds, however, that Goldast sometimes altered texts and introduced some that were apocryphal. Nevertheless, his work is certainly a valuable one.

de l'ancienne collection historique mise au jour par Canisius, et celui des *Annales* de Metz comme l'a remarqué M Baluze.

Henri de Hondt was professor of canon law at Ingolstadt and published the *Antiquae Lectiones* in seven volumes from 1601 to 1608. The allusion is to tome ii of this work, which was not in the library at La Brède. In fact this is one of the rare cases in which it is not so far possible to suggest the library from which Montesquieu probably obtained the work. The *Annals* of Metz will be mentioned later on when we come to the collections of histories and chronicles.

Another work whose provenance is so far unknown is the *Bibliotheca ecclesiastica* of Aubert le Mire (1573 to 1646), published in 1639. the author was a Jesuit scholar who lived in Antwerp. In Book XXXI, chapter 31: 'Comment l'Empire sortit de la maison de Charlemagne', Montesquieu refers to Aubert le Mire in connection with the Pact of Bonn, in the year 926, between Charles the Simple of France and the emperor Henry I.

It seemed worthwhile to take this brief look at sources other than the *Capitularia* of Baluze for the acts and edicts of the kings of France, before the Capetian dynasty. In general Montesquieu refers to them just as a cross reference to Baluze, or for an additional telling detail towards a line of thought already well documented. Nevertheless, it is interesting to know that he took pains to become acquainted with these works. None of them was in the collection at La Brède when he inherited it. One was added in 1746/7, one was borrowed from the Academy of Bordeaux, one was probably borrowed from the Oratorians as was also the case with the *Capitularia* of Baluze, and two are of unknown provenance. All this is evidence of a serious and sustained effort to acquire knowledge in the specialist field concerned.

Next it is appropriate to look at the collections of histories, and chronicles concerning the Merovingian and Carolingian periods. The *Recueil des historiens* is the major work in this field, but it was far from complete when Montesquieu was writing. We must set the *Recueil* in perspective and look particularly at the work which was its immediate precursor. The *Recueil* was the third of the attempts made by the French state to publish all the documents relative to the history of France.

Dom Bouquet in the preface to tome i explains that Pithou was the first to attempt this task, and that his work appeared in two volumes in 1588 and 1596, and covered the period up to 1285. Nothing further appeared until the work was begun again by André Duchesne. This scholar, designated by Bouquet (p.i.) as 'si digne par tant de titres du nom de père de notre Histoire', enjoyed the favour of Cardinal Richelieu and became successively 'géographe du roi' and 'historiographe du roi', the king of course being Louis XIII. Duchesne undertook to start the collection again from the beginning and the plan, published in 1635, was (to quote Bouquet again p.ii) to bring together 'toute la suite des anciens monuments de l'Histoire générale de la Monarchie, depuis son origine jusqu'au règne d'Henri II'. The plan was originally for twenty volumes and then for twenty-four, but in fact André Duchesne lived to see only two of those printed. Two more were in preparation when he died in an accident on the road in 1640, and were seen through the press by his son François Duchesne

who also brought out a fifth volume in 1649. Although François was a scholar also, and became 'historiographe du roi' in his turn, he does not seem to have possessed his father's qualities. The last volume is less full and interesting than the others. However, the collection so far as it went was the best available until the *Recueil des historiens* eventually superseded it. Bouquet himself (p.ii) calls the *Historiae Francorum scriptores* of Duchesne 'le recueil le plus complet que nous ayons'.

The contents of the five volumes are described in the works themselves as follows:

i (published 1636): 'Francorum Reges Merovingi Quorum Res Gestae' (beginning at approximately the year 420).

ii (published 1641): 'A Pipino Caroli M. Imp. Patre usque ad Hugonem Capetum Regem'.

iii (published 1641): 'A Car. Martello Pipini R. Patre usque ad Hugonis et Roberti Regum Tempora'.

iv (published 1641): 'Ab Hugone et Roberto Regg usque ad Philippi Augusti Tempora'.

v (published 1649): 'A Philippo Augusto Rege usque ad R. Philippi IV Dicti Pulchri Tempora' (this volume in fact ends with Philippe III).

There is some overlap between the volumes and although, as Bouquet tells us, the plan was to be strictly chronological, there seems to be less arbitrary cutting of histories and chronicles into segments for particular periods than occurs in the *Recueil* itself.

Neither the *Biographie universelle*, 1855, t.xi, nor the *Nouvelle biographie générale*, republished 1965, t.xiii, add anything of significance to Bouquet's account of this particular work by 'Duchesne père et fils'. The more recent article by Roman d'Amat on André Duchesne, does him less than justice. His work is briefly described in these terms. (*D.B.F.*, xi (1967), pp.1231-32):

> Il a écrit un peu sur tous les sujets et l'on se rend compte bien vite que ce fut plutôt pour se procurer des ressources que par vocation d'historien. Ses généalogies valent ce qu'elles valent, ses histoires sont des compilations d'une valeur toute relative, sa *Bibliothèque des historiens de France* n'est qu'une tentative. Cet auteur n'est que de peu d'utilité pour l'historien moderne; il a sans doute utilisé des documents perdus pour nous, mais il est difficile d'apprécier la valeur de ses lectures et de ses interprétations.

The *Bibliothèque des auteurs qui ont écrit sur l'histoire et topographie de la France* was published in 1618. Roman d'Amat does not even mention the *Historiae Francorum scriptores*. One wonders whether he even knew that it existed. Of course, it was superseded in time, but that was not until a hundred or more years later. Montesquieu appears to have acted judiciously. He used the *Historiae Francorum scriptores*, the *Recueil des historiens*, and some individual editions up to the period of Charlemagne, and after that the earlier collection and individual editions only, because the *Recueil* had not gone beyond Charlemagne when *De l'esprit des lois* was published in 1748.

The subject matter of the *Historiae Francorum scriptores* is quite distinct from the collections made by Lindenbrog and Baluze. It does not consist of legal texts but of descriptive writing of various kinds – histories, short chronicles, 'gestes', lives and annals. The historical value of these accounts varies very greatly. The

authors by no means always confine themselves to contemporary events, and, even when they do, their accounts cannot of course be taken for gospel. Those who describe events of their own time most probably see and understand only in part, and they must be read with caution, especially when the subject matter concerns the monarchy or the Church. Nevertheless, when used with discernment, these early writings are most valuable to the student of history, indeed they are the foundation on which historical scholarship is built. The author of *De l'esprit des lois* turned to them to see the laws in action, as it were.

As we have seen, after Duchesne there was another long gap before the work was continued – so long that it was once again necessary to go back to the beginning. Louis XIV's great minister, Colbert, tried to set the scholars at work again. In 1676 he got together a committee of 'savants', including Du Cange, to consider a plan. Bouquet tells us, still in the preface of t.i, p.II of the *Recueil*, that disagreements and jealousies made it impossible to proceed and that Du Cange 'soutint impatiemment que le sien [son plan] n'eût prévalu'. Léopold Favre, in his preface to the 1882-1887 edition of Du Cange's *Glossarium*, puts a rather different light on the matter:

> Ce savant rédigea la préface et exposa le plan de ce recueil, sans se préoccuper des idées du ministre, qui le trouva défectueux et en demanda un autre. Du Cange, trop consciencieux pour faire œuvre de courtisan, refusa de changer son premier plan, qui ne pouvait être modifié sans nuire à ce recueil, et qui, un demi-siècle plus tard, devait être mis à exécution par Dom Bouquet.

Dom Mabillon was also approached but refused to undertake the work. A certain criticism may be detected beneath Bouquet's description of this episode: 'Le célèbre P. Mabillon, trouvant dans une humble défiance de soi-même des raisons pour se dispenser d'un travail dont lui seul peut-être eût été capable, résista constamment aux solicitations du Prélat [Le Tellier, archbishop of Rheims] qui le pressait de s'en charger' (pp.ii-iii).

However, it does not seem that the delay was attributable only to a clash of opinion between minister and scholar. The Royal Treasury in the reign of Louis XIV was constantly under pressure from the long series of wars. It was not until the reign of Louis XV that the project was again taken up seriously by another minister, the chancellor d'Aguesseau. He presided personally at meetings to discuss the plan of operation and, what was more, he obtained a grant from the Royal Treasury. An Oratorian, le père Le Long, was at first named as editor, but he died in 1721. Finally, on the instance of dom Denys de Sainte Marthe, superior general of the Benedictines of St Maur, the work was entrusted to that congregation, which, though bitterly divided by the Jansenist controversy, was still, in the words of A. Molinier, 'au point de vue scientifique, active et florissante'.[11]

The work was taken in hand by dom Bouquet in 1723, but again delayed by his exile to Laon brought about because of his Jansenist sympathies, so that although two volumes were ready by 1729, it was not until 1735, when he returned to Paris, that preparation for publication could begin.

The first volume of Duchesne's collection had appeared in 1636. The first

[11] *Les Sources de l'histoire en France*, t.v. (1904).

volume of the *Recueil des historiens* appeared in 1738. Textual scholarship had made considerable advances during the intervening century, and so it is not surprising that it was decided to go back again to the beginning of French history proper, and reproduce for the periods concerned the texts already printed by Duchesne, amended and annotated in the light of later scholarship, as well as other relevant texts which had become available.

Dom Bouquet announces optimistically in the preface to tome i (pp.VI-VII):

> Telle enfin a été notre assiduité au travail que les matériaux de l'histoire des deux premières races déjà rassemblés dans nos porte-feuilles et disposés dans leur ordre, sont prêts à être donnés au public; et que la collection de ceux qui concernent l'histoire de la troisième est assez avancée pour que nous osions présumer de pouvoir la pousser jusqu'au règne de François I, si celui qui tient nos jours dans sa main, ne les abrège pas.

The first five volumes of the *Recueil* appeared from 1738 to 1744, before the publication of *De l'esprit des lois*. Dom Bouquet in fact lived until 1754 and three more volumes appeared under his editorship. Altogether the eight volumes contained almost all the relevant known documentation for the Merovingian and Carolingian periods. After his death, the work seems to have been treated with a surprising lack of urgency, though it was continued (no doubt with interruptions caused by wars, revolutions and changes of dynasties and government) at first still by the Benedictine Order and then by members of the Académie des inscriptions et belles lettres. It was not until 1904 that the last volume of the series, tome 29, appeared. In the meantime the first 19 volumes, reprinted under the direction of Léopold Delisle, came out from 1867 to 1871.

The work of scholarship is long, but the life of the historian and philosopher is brief, and Montesquieu had to make do with what was available in the way of texts. Moreover, even those volumes of the *Recueil* which had been published suffered from certain serious limitations which help to explain why he frequently refers to other editions of the texts, including Duchesne, Lindenbrog, and separate editions of individual authors. Firstly, as is implied by the title *Recueil des historiens des Gaules et de la France*, documents are included only if they have some more or less obvious relevance to the history of 'les Gaules' or France, whereas to a certain extent Montesquieu compares and contrasts developments in France with developments elsewhere in Europe. Secondly, the plan, which dom Bouquet and his successors followed meticulously, was to observe a strict chronological order, so that, for each period, only the accounts relating to that period are presented together.

This means that certain chronicles which cover a lengthy period are divided between a number of volumes. The comment by A. Molinier is illuminating:

> De ces inconvénients, le plus grave est de rendre à peu près impossible toute étude critique sur tel ou tel ouvrage historique épars dans cinq, six, ou sept volumes différents, et de ce chef, il faut, pour beaucoup de chroniques de second ordre, recourir soit aux éditions intégrales, anciennes ou modernes, soit même aux manuscrits.[12]

We have already seen that Montesquieu used the *Recueil* for the history of Gregory of Tours, and it is relevant that, since the history was composed in the

[12] *Les Sources de l'histoire en France*, t.v (1904).

first or Merovingian period, it is given in its entirety in tome ii of the *Recueil*, so that it was easy to consult in this, the latest, edition. We know this, however, only because in one particular instance a page number is quoted. Frequently Montesquieu refers just to a particular chronicle, probably giving the chapter or heading and any other information required to trace the reference, but not the edition used. If he does mention the edition, it is usually the 'recueil de Duchesne', though as a rule this occurs for the period after Charlemagne, i.e. the period not yet reached by the *Recueil*.

It is natural that, writing after a hundred more years of research, dom Bouquet, in the preface of tome i of the *Recueil*, is a little condescending towards Duchesne. However, not only did the various volumes of the *Recueil* take an unconscionably long time to appear, but also many of the texts in the *Recueil* are given in the version by Duchesne or based on Duchesne. A few instances from among the more important texts may serve to illustrate the debt owed by the later collection to the former. The instances are all taken from tome ii of the *Recueil*.

Firstly there is the chronicle of Marius. Dom Bouquet in the preface to tome ii, p.i, says:

> La chronique de Marius est un manuscrit très précieux et sert beaucoup à illustrer les commencements des Rois des Francs. Elle commence à l'an 455 et finit en 581, elle pèche quelquefois contre la chronologie [...] Marius etait évêque d'Avenches ou de Lausanne: il souscrivit en cette qualité au second Concile de Mâcon tenu en 585. Le P. Chifflet, Jésuite, qui a publié le premier cette chronique avec le supplément, remarque que Marius était Edren, né de parents nobles, et qu'il passa vingt ans et huit mois dans l'Épiscopat. L'Auteur du supplément est inconnu, mais il est fort ancien: il écrivit dans la 40 année du règne de Clotaire I, la 624 de Jésus-Christ.

The version of the chronicle in the *Recueil* is taken from Duchesne, t.i, starting at p.210, followed by the 'supplément' or Appendix starting at p.216.

As a second example there is the important chronicle known as the *Annales de Metz*. Dom Bouquet tells us in the preface to t.ii of the *Recueil*, pp.xix-xx, that these annals were

> composées par un Moine de S. Arnoul de Metz. Elles commencent dès les premiers temps de la Monarchie Française et vont jusqu'en 904. Duchesne, qui les a imprimés sur un ms du P. Sirmond, en a omis tout ce qui précède l'an 687 parceque cela était copié mot à mot d'anciens écrivains. M. de Valois remarque que cet auteur a des choses excellentes et mémorables sur le Duc Pépin, sur Charles-Martel et sur ses trois fils et qu'on chercherait inutilement ailleurs . . .

The text printed in successive volumes of the *Recueil* is that established by Duchesne in t.iii, starting at p.262.

The third example shows the *Recueil* still using a text by Duchesne, but adding additional information based on later research. This concerns the so-called chronicle of Frédégaire. Dom Bouquet says in the preface to t.ii, p.x:

> André Duchesne a cru que depuis le commencement jusqu'à l'inauguration de Pépin, elle avait été composée par Frédégaire par ordre de Childebert, oncle de Pépin; et que depuis l'inauguration de Pépin jusqu'à sa mort, elle avait été continué par le commandement de Nibelunge fils de Childebrand. D. Ruinart démontre que le premier

auteur a achevé sa Chronique en l'an 641 et que depuis cette année jusqu'à la mort de Pépin elle a quatre continuateurs différents.

The *Recueil* reproduces the text by Duchesne, with notes by dom Ruinart. True to its system, the fourth continuation is found not in tome ii, but in tome v, because that volume deals with events in the second or Carolingian dynasty.

These few examples help to explain why Montesquieu frequently refers direct to a particular text (giving chapter and verse), without directing the reader to Duchesne or to the *Recueil*, or to a separate edition. Probably his original notes were made either from separate editions or from the Duchesne collection, since he possessed this at La Brède, and the work was included when the catalogue was first drawn up. His knowledge of the *Recueil* is, however, also established, and he may well have verified references which appeared in both collections. As we have seen, he certainly did so in the case of Gregory of Tours's history. In other cases, we cannot really be sure. It is however certain that he had access to the latest printed versions of the histories, chronicles, etc. to which he refers so frequently in the historical books of *De l'esprit des lois*.

It is appropriate now to turn to the texts themselves, especially those to which Montesquieu returns most frequently, and see what they were and, if possible, why they were valuable for his purposes. As an introduction to this research, we cannot do better than begin with the *Historia Francorum* of Gregory of Tours. Gregory, who lived from about 544 to 595, became bishop of Tours about the year 573. He lived in far from peaceful times. The Merovingian kings, queens and lesser royalty were engaged in killing each other off in the struggle for supremacy, and the nobility and higher clergy took part in their quarrels as well as in rivalries amongst themselves. The history Gregory composed is in ten books. The first is an account of the history of the world from its beginning up to the end of the fourth century. The first thirty chapters of the second book begin with the fifth century and end at the conversion of Clovis and his subjects to Christianity. Dom Bouquet comments in the preface to tome ii, p.III: 'Depuis le baptême de Clovis jusqu'à l'an 592 où Grégoire finit son histoire, il ne se trouve que pareil nombre d'années; en sorte qu'il paraît, selon la remarque de M. Dubos dans sa Préface,[13] que Grégoire de Tours n'a entendu commencer proprement son histoire qu'à la conversion de Clovis.'

From Book IV onwards, Gregory is recounting events which occurred in his own lifetime. His work is still regarded as the best single source for the Merovingian period. B. Hauréau says that the *Historia Francorum* is an

ouvrage aussi important pour l'histoire de l'ancienne Gaule que celui d'Hérodote l'est pour l'histoire de l'ancienne Grèce. Il n'y a pas à parler du style et de la méthode de l'auteur; c'est un homme sans lettres qui a raconté naïvement, dans une langue barbare, les faits dont il a été le témoin. Mais que ce témoignage est instructif! En effet, Grégoire ne se contente pas, ainsi que le plus grand nombre des anciens chroniqueurs, d'esquisser à larges traits les faits principaux de l'histoire contemporaine: c'est un narrateur plein de rudesse, et d'une franchise souvent indiscrète, qui dit tout, apprécie au point de vue de ses idées, de ses passions personnelles, tous les événements qui s'accomplissent sous les yeux, et fournit ainsi à chaque page les renseignements les plus curieux, les plus utiles

[13] Dubos, *Histoire critique*, i, Discours préliminaire, p.23.

à l'érudition, les plus propres à faire naître dans l'esprit du lecteur ces heureuses conjectures qui sont le germe fécond de la science.[14]

M. Hauréau mentions particularly the 1699 edition of the works of Gregory of Tours by dom Thierry Ruinart of the Benedictine Order of St Maur. As might be expected, the *Recueil* uses this edition, and indeed is able to add something to its value. Dom Bouquet says, again in the preface to t.ii of the *Recueil*: 'Nous avons conféré l'édition de D. Ruinart sur deux manuscrits qu'il n'avait pas vus et nous en avons donné les différentes leçons. Le premier de ces manuscrits, qui est du neuvième siècle, était de la Bibliothèque de M. le Cardinal Dubois; l'autre, qui paraît être du onzième siècle, est conservé dans l'Abbaye de Cluny' (p.v).

He adds that since the volume went to the press, another manuscript had come to light at the church at Cambrai; he notes the divergences and is able from this manuscript to clear up one or two difficulties in other texts. There can be no doubt therefore that in using the history of Gregory of Tours in the edition printed in the *Recueil*, Montesquieu had a source of primary importance in a version benefiting from the latest scholarship.

After the history of Gregory of Tours, perhaps the most important individual text is the *Monachi formularum libri* of Marculf. These 'formulas' are a collection of model enactments drawn up by, or at any rate in the name of, Marculf, a monk who lived in Paris about the middle of the seventh century. The work was readily accessible to Montesquieu who possessed three copies of the edition by Jérôme Bignon at La Brède. The formulas appeared also in the collection of Baluze and the *Recueil des historiens* t.iv. It is worth quoting part of the introduction (t.iv., Preface, pp.x to xii), to show the importance of this collection:

> Nous savons peu de choses de Marculf dont nous donnons les Formules . . . Nous savons certainement qu'il était Moine; c'est lui-même qui le dit à la tête de sa préface; mais le monastère qu'il habitait, nous est inconnu . . .
>
> Marculf divise son ouvrage en deux livres. Le premier contient les Chartres Royales, c'est-à-dire les Lettres et les Actes qui s'expédiaient au nom du Roi et dans le Palais; le second comprend les Chartres des Cantons, c'est-à-dire celles qui se faisaient dans chaque canton ou comté en présence du Comte, ou du Viguier ou du Centenier. Tous les Savans tombent d'accord que ces Formules sont d'une grande utilité pour expliquer quelques endroits obscurs de Grégoire de Tours, pour bien entendre les usages et les coutumes des anciens Français, et pour interpréter les Loix des Saliens, des Ripuaires, des Alemans, des Saxons, des Bavarois, et même les Capitulaires des Rois de la seconde race. Marculf a non seulement amassé les Formules de plusieurs Chartres qui existaient de son temps, il en a fait aussi de son chef. Son recueil n'avait pas force de loi, et il était permis aux Notaires de dresser des Actes suivant leur caprice. Ainsi l'on aurait mauvaise grâce de regarder une Chartre comme fausse par cette seule raison qu'elle ne serait pas conforme à ces Formules. Nous avons revu l'édition de M. Bignon sur celle de M. Baluze; et par le moyen de ce dernier nous avons fait plusieurs corrections.

It is apparent then that both in the *Capitularia* of Baluze and in the *Recueil* Montesquieu had access to the most correct version of this indispensable work. In both of these collections, moreover, other surviving texts of formulas are

[14] *N.B.G.*, xxi.862-63.

printed, as well as the notes of several scholars (such as Bignon, Sirmond, Lindenbrog and Baluze).[15]

The article in the *Nouvelle biographie générale* (xxxiii.513) adds little to our knowledge of Marculf. It says that he was born towards the end of the sixth century, in the diocese of Paris and died after 660.

Another history to which Montesquieu refers frequently in the historical books is the *Chronicle of Frédégaire* and its continuations. We have already seen that the version in the *Recueil* uses the text by Duchesne, with notes by dom Ruinart. In the preface to tome ii of the *Recueil*, p.ix, dom Bouquet says that even the name 'Frédégaire' is uncertain 'puis qu'il n'y a aucun manuscrit qui porte son nom',[16] but it seems certain from the interior references that whoever composed the first chronicle was Burgundian. In any case the author, whom we may as well call Frédégaire, first made an abridgement of the work of Gregory of Tours and then continued with his own chronicle up to the year 641. The continuations, which are still identified by the name of Frédégaire, are also described by dom Bouquet. The first continuation seems to have been written after the others, to fill the gap between 641 and 680. It is just a collection of 'fables' taken from the *Gestes des Francs* and the *Histoire de Dagobert* – an indigestible accumulation of events, not placed in sequence.

The second continuation goes from 680 to 735, and the chronicler 'rapporte assez exactement ce qui s'est passé surtout en Austrasie.'

The third continuation takes the story up to the inauguration of Pepin in 752 and was composed on the orders of the comte Childebrand, uncle of Pepin, 'comme nous l'apprend une ancienne inscription tirée du manuscrit du monastère de Saint-Claude'.

The fourth continuation takes the story up to the year 768 in the reign of Charlemagne.[17]

The article in the *Nouvelle biographie générale* (xviii.624-25) scarcely adds to the information given by dom Bouquet. No other edition of the chronicle of Frédégaire was produced until it was included in t.ii of the *Collection des mémoires relatifs à l'histoire de France* edited by M. F. P. Guizot in 30 volumes 1823-1835. The appreciation of the value of this chronicle, which appears in the article just mentioned in the *Nouvelle biographie générale* is however worth noting:

> La chronique [...] est le seul monument où nous puissions étudier l'histoire contemporaine; si la chronique de Frédégaire nous manquait, une nuit à peu pres complète séparerait Grégoire de Tours des historiens de Charlemagne; et en disant la chronique, nous entendons aussi parler des continuations qui en ont été faites en différents temps, et qui mènent le lecteur jusqu'à l'avènement de Charlemagne au trône.

Again therefore the fact is that Montesquieu used the best documentary source

[15] From Montesquieu's references to Marculf, it is impossible to say which edition he actually used. The wording for these references in the Bignon edition is identical to that in the *Recueil*, which in turn incorporates any amendments made by Baluze.

[16] De Valois claimed to have found the name on a manuscript but if the claim was true, the manuscript must have subsequently been lost.

[17] The four continuations of Frédégaire's *Chronicle* are described in the *Recueil des historiens*, t.ii, Preface, p.xi.

available for the period between 592 when the history of Gregory of Tours finishes, and the year 768 when Charlemagne came to the throne.

The *Gestes des rois de France* and the *Gestes* or *Histoire* or *Vie de Dagobert* are also printed both in t.i of Duchesne's collection and in t.ii of the *Recueil des historiens*. Montesquieu makes passing reference to them, though his usual source of reference for the period is the *Chronicle of Frédégaire*. Neither of the two compilations is of great value, except for having survived. Dom Bouquet, in the preface to t.ii, p.xv, after explaining that the life of Dagobert was written by a monk of the monastery of Saint Denis, who probably lived about the beginning of the ninth century, adds

> Ce moine anonyme a farci son histoire de choses si fabuleuses et si incroyables, qu'il ne mérite pas qu'on le croie, si ce n'est dans ce qu'il emprunte de Frédégaire. Il ne faut pas douter cependant qu'il n'ait eu une parfaite connaissance des donations faites au Monastère de S. Denys par Dagobert, puisqu'il assure que les originaux en étaient conservés de son temps dans les archives de cette Abbaye.

Montesquieu makes a passing reference to the *Annals of Fulda* and more frequent and detailed references to the *Annals of Metz*. These annals were compiled in the monasteries after which they are named. They are not, however, records of the events in the monasteries but accounts of the principal events in the state year by year.

The *Annals of Fulda* are in Duchesne t.i. They cover the period 714 to 900. Annoyingly, according to the invariable practice of the *Recueil des historiens*, the annals are printed in different volumes of that collection following the chronological scheme. Thus t.ii of the *Recueil* contains the years 714 to 752 only, and the annals are continued in t.v. and later volumes. Duchesne's version is revised in the *Recueil* – dom Bouquet says in the preface to t.ii, p.xix, 'Il y a dans la Bibliothèque de l'Empereur un ms de ces annales plus ample et plus correct, dont Lambecius rapporte les corrections at les augmentations.'

These annals are very brief records. Usually only one or two lines are devoted to each year. One of the fullest entries, but still very brief, is that for the year 752, when the pope sanctioned the transfer of the crown from the Merovingian line to Pepin. The account is so short that it can be quoted in full, just to give an idea of the nature of the work (*Recueil des historiens*, ii.676):

> DCCLII Zacharias Papa ex auctoritate Petri Apostoli mandat populo Francorum, ut Pippinus, qui potestate Regia utebatur, nominis quoque dignitate frueretur. Ita Hyldricus Rex, qui ultimus Merovingorum Francis imperabat, depositus, et in Monasterium missus est. Pippinus vero in civitate Suessionum a sancto Bonifacio Archiepiscopo in Regem unctus, regni honore sublimatus est.

The *Annals of Metz* are much fuller, and more important for the historian. As we have seen, they were composed by a monk of S. Arnoul in Metz, and they continue from the beginning of the French monarchy to 914. Duchesne prints them in t.iii of his collection, and in the *Recueil* there is an extract for the period up to the year 741 in t.ii, and a further extract in t.iii for the years 742 to 752, and then continuations in t.v. and later volumes.

It seems that the annals, especially those of Metz, are useful sources for the period, though they should be read with due precautions. Dom Bouquet, in the

preface to t.ii of the *Recueil*, p.xx, says of the author of the *Annals of Metz* that 'Il met quelquefois la chronologie tout de travers'. It was Montesquieu's habit to check his sources against each other, and these annals are usually mentioned along with other documents.'[18] It seems therefore that he made prudent use of this valuable material.

The only other early general historical chronicle which is important as a source of reference in the historical books of *De l'esprit des lois* is the *Historiae Francorum*. This was composed by Aimoin, a monk at Saint-Benoît-sur-Loire, of whom we know but little. He died after the year 1010. His unfinished work takes the history of France from the beginning up to the year 654 only, and he was, of course, therefore writing about events already many centuries in the past. His history is printed in t.iv of Duchesne's collection and in t.iii of the *Recueil*. It is understandable that the work is not much more than an amalgamation of previous compilations. H. Stein says of the chronicle that 'elle est dépourvue malheureusement d'originalité et de critique, l'auteur ayant surtout compilé et amalgamé des extraits de César, d'Orose, de Grégoire de Tours, de Frédégaire, de Paul diacre, de différentes vies de saints, des *Gesta Dagoberti* etc. auxquels il a essayé de donner une apparence d'unité' (*D.B.F.*, i.1015-16).

Dom Bouquet was no less severe on Aimoin: 'La plupart des historiens et des chronographes que nous donnons ici', he said in the preface to tome iii of the *Recueil*, which contains the *Historiae Francorum*, 'n'apprennent presque rien de nouveau et ne font que copier Grégoire de Tours, Frédégaire et l'auteur des *Gestes des Rois de France*.' He adds judiciously, however, that sometimes the later writers pick up details that earlier ones had missed and that 'les écrivains modernes, comme de Valois, le Cointe, Mabillon, Pagi, qui traitent de l'histoire de France, se servent du témoignage de ces auteurs pour appuyer leurs sentiments.' Montesquieu was therefore in respectable company when he referred to Aimoin from time to time. Indeed, H. Stein says that Aimoin's *History*, with its continuations, became very popular: 'elle a trouvé une place dans les chroniques postérieures, devenant pour ainsi dire la source officielle de l'histoire de la monarchie sous la première race'. This popularity is borne out by the fact that there were two separate editions of Aimoin, published in 1567 and 1603, at La Brède, as well as the edition in Duchesne, t.iv. Dom Bouquet says that the version printed by Duchesne is the most correct and he reproduces it in t.iii of the *Recueil*.

Montesquieu makes no sharp distinction in his account between the reign of Charlemagne and the reigns of his predecessors. Indeed in Book xxxi, when he is considering feudal laws in their relationship to the changes in the monarchy, he puts the turning point much earlier, when the power passed de facto from the Merovingian kings to the house of Pepin. This he considers to have occurred not later than the year 687, when Pepin i of Heristal, *maire du palais* of Austrasia, won a decisive victory over Thierry iii, king of Neustria. When Pepin's grandson,

[18] See for example *Lois*, xxxi, 9: 'Comment les biens ecclesiastiques furent convertis en fiefs'. Montesquieu refers three times to Gregory of Tours (Book vi, ch.46; Book vii, ch.7 and Book v, ch.19), once to the *Annals of Metz* (for the year 687), and once to the *Chronicle* of Certulensis (Book ii).

who was the father of Charlemagne, was consecrated king about 70 years later, this was but the recognition of an established fact. The continuations of Frédégaire and Aimoin, the *Annals* of Fulda and Metz continue to be the main sources, apart from legal enactments. The most important new sources to be found in Duchesne and t.v of the *Recueil* are the lives of Charlemagne and his descendants, though it is interesting that for the reigns of Pepin and Charlemagne, Montesquieu, for the first time, supplements the *Capitularia* of Baluze by references to the collection in t.v of the *Recueil*.

As we should expect, several lives and 'gestes' of Charlemagne had survived and were in print. The only one mentioned specifically by Montesquieu is the *Life* by Eginhard. Though the reference is made only in passing, it is relevant to know that he had studied this particular work which, in the opinion of modern scholars, is superior to other lives of Charlemagne and also to any previous attempts by writers of the middle ages to compose biography. Eginhard, though some thirty years younger than Charlemagne, had first hand knowledge of the great king. He entered his court at about the age of sixteen in 791 or 792, and in 806 was sent by him to the Pope, at whose court he stayed until 814, the year of Charlemagne's death. He became secretary to Charlemagne's son and successor, Louis the Pious, and soon he was given charge of Louis's eldest son, Lothair. He retired from the Court to Seligenstadt in 827 and died in the year 840. His *Life of Charlemagne* was reprinted in 1923 in the series *Classiques de l'histoire de France au Moyen-âge*. The editor of the 1923 edition, Louis Halphen explains that it was thought for a long time that Eginhard wrote just after the death of Charlemagne and this seemed proved by the dating of an entry in the catalogue of the library of the monks of Reichenau. It is now thought, however, that part or all of the catalogue may have been composed at a later date and the first definite reference to the *Life* is in a letter by Loup, the future abbot of Ferrières, written between 830 and 836. It seems likely therefore that Eginhard wrote during his retreat at Seligenstadt, some time after the events he relates. Nevertheless he had been in an excellent position to get inside information, and he seems to have brought to the work of composition literary gifts which were very unusual if not unique at that time. He modelled his work on that of Suetonius for the Caesars, and while the form may have constrained the subject matter to some extent, the result is a work much in advance of its time. Louis Halphen, in the preface to the 1923 edition says (p.xii):

> Grâce à cette méthode, il [Eginhard] a été à même d'écrire une œuvre très nettement supérieure au point de vue de la forme à tout ce que le moyen-âge occidental avait jusqu'alors produit en ce genre. Qu'on compare cette biographie bien ordonnée, en dépit de quelques gaucheries, d'un style ferme et relativement correct, aux vies de saints antérieures, et l'on mesurera le chemin parcouru.

Montesquieu had his own copy at La Brède of the *De Vita et gestis Caroli Magni* by Eginhard in the first printed edition of 1521. No doubt he first studied the work in this edition, though he could have looked at it again in Duchesne, t.ii and the *Recueil*, t.v. It seems most probable that his very high assessment of Charlemagne, both as man and a ruler, in Book xxxi of the *Lois* and in particular in chapter 18, is based primarily on Eginhard's account, supplemented by references to the *Capitularies*.

After Charlemagne, and until the end of the Carolingian period, Duchesne's collection is the usual source for individual lives of kings and saints. Also, of course, it is in Duchesne, and not the *Recueil*, that the *Chronicles* named after Frédégaire and Aimoin, the *Annals* of Fulda and Metz, and other chronicles and annals were available in printed form after the reign of Charlemagne. Looking now at the individual lives we find that those to which Montesquieu refers were of considerable importance.

For the life of Louis the Pious (Louis le Débonnaire), Charlemagne's successor, who reigned from 814 to 840, the individual sources are 'L'auteur incertain de la vie de Louis le débonnaire', as well as Thégan and Nithard. Thégan was auxiliary to the Archbishop of Trèves. Apart from this one work, little is known of him. It appears from an allusion in the work of a contemporary, Wilfred Strabon, that he must have died before 849. His chronicle was published for the first time by Pithou in 1588 and afterwards included in the great collections. The article on Thégan in the *Biographie universelle* (Paris 1843-1865, xli.235) indicates the importance of his work and that of the 'auteur incertain' (xli.235):

> L'œuvre de *Thégan* contient surtout des détails intéressants sur l'état de la société au temps de Louis le débonnaire, le caractère et la vie privée de ce prince. Mais la chronique de *l'Anonyme*, dit *L'Astronome*, sur le règne de cet empereur, est beacoup plus complète et présente les faits avec plus de suite et de développement. Elle complète pour ainsi dire Thégan; et ces deux documents, également curieux, sont indispensables pour écrire l'histoire du successeur de Charlemagne.

J. Balteau confirms this view. Writing about 'l'auteur incertain', who was given the title 'l'Astronome', because he studied astronomy and was consulted by Louis the Pious about the comet of the year 837, he says: 'la *Vie de Louis le Pieux* par l'Astronome est une des œuvres historiques les plus importantes du temps malgré quelques erreurs qui s'y sont glissées' (*D.B.F.*, iii.1382).

Nithard is less significant so far as Louis the Pious is concerned, but very important for the period immediately following, when the Empire broke up between the three legitimate heirs. Nithard was Charlemagne's grandson, being the natural offspring of Berthe, his daughter, and Angilbert. He served Charles the Bald, one of the three heirs, and was sent by him in 840 as an envoy to Charles's brother, the Emperor Lothair, to try to conclude peace terms. The history he composed on the orders of Charles the Bald covers briefly the reign of Louis the Pious, but is remembered for the main section entitled *De dissensionibus filiorum Ludovici Pii*. The article in the *Biographie universelle* explains the value of this eye-witness account of a crucial period in the emergence of France as a nation (*Biographie universelle*, xxx.606):

> Quoique cette histoire (si l'on excepte l'introduction, qui remonte à Charlemagne) n'embrasse qu'un espace de trois ou quatre ans, c'est un des morceaux les plus curieux de la collection de nos annales, parce que l'auteur, à la fois homme de guerre et homme d'état, qui n'a manqué ni d'esprit ni de jugement, fut témoin aux événements qu'il raconte et a connu comme les causes secrètes qui les avait produits.

Nithard took part in the battle of Fontenoy, 841, when the three sons fought to decide the division of power, and he reported literally, in the two original languages, Romance and Teutonic, the oath taken at Strasbourg in 842 by

Charles the Bald, Louis the German, and their respective armies. The importance of such testimony would be difficult to over-emphasise.

It was again Pithou who first published the history, in the series *Douze historiens contemporains* (Paris 1588, and Frankfurt 1594). Montesquieu possessed the Paris edition at La Brède (Catalogue No.2900), but he says explicitly that he used Duchesne for the biographies of Louis the Pious, by Thégan and the unknown author, and it is likely that he used Duchesne for Nithard also. It seems that Duchesne's version (t.ii, 1641) was much more correct than the version by Pithou, though a still better text was provided in t.vii of the *Recueil des historiens*, not published until 1749.

There is one other work outside the big collections to which Montesquieu makes a passing reference in connection with a chronicle. This is the *Mémoire de l'histoire de Languedoc*, by G. de Catel, published in 1633. This is not at La Brède, but may have been borrowed from the Oratorian library. It is mentioned in the *Spicilège*[19] as one of fourteen works concerned with the *parlement*. The chronicle in question is for the year ended 759 and concerns the conservation of Roman law in lands where the Goths had established themselves, even after the lands had been reconquered by Pepin and Charles Martel. In the original 1748 edition of *De l'esprit des lois* the footnote reference (*Lois*, XXXVIII, 4) to Catel and this particular chronicle stands by itself. In the revised 1757 edition, however, Montesquieu supports his point by two other references taken from Duchesne's collection, one from Gervase of Tilbury and one from the 'auteur incertain' of the life of Louis the Pious.

There is not much else in the way of sustained narrative in Duchesne's collection up to the time when Hugues Capet took the title of king, though Montesquieu makes passing references to other short pieces and fragments, which are of little significance. He does, however, refer occasionally to documents of a different kind, namely letters, and these are certainly significant to an understanding of the period. In the preface to t.iv of the *Recueil*, 1741, p.i, dom Bouquet refers to the importance letters might have:

> Personne n'ignore les secours qu'on peut tirer des lettres des Rois, des Grands du Royaume, des Evêques et des Papes pour illuster notre Histoire. C'est là qu'on découvre les motifs qui font entreprendre une affaire, les intrigues dont on se sert, les moyens qu'on emploie, les ressorts qu'on fait jouer pour y réussir: on y trouve mille autres choses qui ne sont pas rapportées par nos Historiens et qu'on chercherait inutilement chez eux. C'est ce qui a engagé Duchesne à insérer un grand nombre de Lettres dans sa collection: nous y en avons ajouté plusieurs autres.

Two references to letters written in the Carolingian period are of interest. The first is to the letters of Agobard (779 to 840), archbishop of Reims (*Lois*, XXVIII, 4, 26). A particular letter (Montesquieu calls it 'la fameuse lettre') addressed to Louis the Pious is important in the history of civil law in France because in it Agobard protested to the king against the use of ordeals (fire, boiling water, etc.) and single combat as proofs of innocence or guilt. Jean Brethe de La Gressaye comments that the ordeals, in spite of protests by Agobard and the popes Nicholas I and Stephen V, remained a common practice in France: 'Elles

[19] *Spicilège* 315 (ms pp.266-7), Nagel ii.774; Pléiade ii.1297.

furent tres usitées sous les Carolingiens, et ne disparurent qu'au XIIe siècle' (*Lois*, XXVIII, note 54). The official proof by single combat, the 'duel judiciaire', gradually disappeared with the reforms in both customary and written law, but everyone knows how tenaciously the duel kept its place as means of satisfying offended honour between individuals.

It seems that Montesquieu was right to attach such importance to this letter. He mentions it more than once, not only in connection with the actual methods used in trying civil cases, but also to show how the law differed in part of France (Agobard wrote from Burgundy), and to illustrate the limits of Church influence.

The romantic story of the manuscripts of Agobard's works is that they were snatched by Papire Massan from the hands of a bookbinder who was on the point of destroying them. Massan published them for the first time in 1606 and it is this edition which Montesquieu possessed at La Brède. There was a later edition by Baluze in 1666, collated with another manuscipt and edited with notes. The assumption must be, however, that when Montesquieu refers to 'Agobard-opera' in his footnotes, the reference is to the edition he possessed.

The second reference is to the letters of Hincmar, Archbishop of Reims, and in particular to the first letter he addressed to Louis the Stammerer (Louis II), who succeeded Charles the Bald as king of France in 877. It is perfectly possible that Montesquieu consulted his own copy at La Brède of Hincmar's letters in the edition published in 1602 (La Brède catalogue, nos.225 and 2317), but as he does not say so, he may have taken the reference from Duchesne t.ii.

Now leaving Duchesne, and the *Recueil*, we can look at Montesquieu's other sources for the Merovingian and Carolingian periods.

An essential part of his task was of course to understand the language in which the documents were written. Here his indispensable tool was a work, still famous today, which has helped him and generations of scholars to interpret the Latin of the post-classical period. This is the *Glossarium* of Du Cange, which he possessed in his libraires both at La Brède and at Paris, and to which I have already referred.[20]

Charles Dufresne, sieur Du Cange, who lived from 1610 to 1688, and held the post of Trésorier de France at Amiens, was one of the outstanding scholars of the seventeenth century, and the value of his work has endured long after his lifetime. His Latin glossary, *Glossarium mediae et infimae latinitatis*, first appeared in 1678. Léopold Favre, who edited the 1882-1887 edition, says in his preface:

> beaucoup d'ouvrages et une foule de documents publics et privés sont écrits dans cet idiome incorrect et barbare, désigné sous le nom de 'mediae et infimae latinitatis'. Scaliger avait tracé le plan d'un glossaire de cette nature; Meursius l'avait commencé, Spelman et Vossius réunirent un grand nombre de mots, mais aucun de ces lexicographes n'avait pu mener à fin cette colossale entreprise. Du Cange était seul capable de composer ce dictionnaire. Il possédait une immense érudition, une excellente méthode, un esprit clair et un infatigable amour de l'étude.

An example of Du Cange's quality has been given in the chapter on Montesquieu's use of sources in Book XXVIII. Just as striking is the entry under *Lex salica* which gives a clear statement of the existence of the primitive law and the

[20] Chapter 6 above, p.92.

law as amended by Christian Frankish kings, the various editions of the texts and the commentaries available, the fact that capitularies were added to it by Charlemagne and Louis the Pious, and adds a number of references to particular aspects of the law.

Montesquieu, as we know, bought a copy of the 1710 edition in 1717. Meanwhile, the Benedictines of St Maur were preparing a new and revised edition which took account of work published since Du Cange's day by 'savants' such as Mabillon, Martène, Achery, les frères Sainte-Marthe, Baluze, Muratori and Adrien de Valois. It was this edition, dated 1733 when it went to the press but not completed till 1736, which Montesquieu acquired for La Brède in 1746/7 and also possessed in his library at Paris.

The next supplement was not produced until 1766 and then there were new editions in 1840-1850, and in 1882-1887. It can therefore be said with certainty that Montesquieu had the best and most up-to-date help available for the interpretation of his Latin documentation.

There are a few other works it is appropriate to consider now.

It will be remembered from the chapter on the nature and extent of Montesquieu's research that he makes some use of Greek and Latin historians of the later Roman Empire, whose accounts cast some light, though only incidentally, on conditions in 'les Gaules' at about the time the French monarchy was established. There are only four of these: Zosimus, Procopius and Agathias, who wrote in Greek, and Cassiodorus, who wrote in Latin.

Zosimus, writing in the fifth century, composed the *Historiae novae*. This is in the library at La Brède in an edition of 1531. There is a brief reference to his work in Book xxx, chapter 7, to illustrate the relationship of the invading Visigoths, under their king, Alaric, with the Roman Empire. Rather more important is the reference in chapter 24 of Book xxx to the account given by Zosimus of the Armorican republic established in Gaul. Montesquieu objects to Dubos's use of this account to bolster his theory that Clovis was invited to become the legitimate successor of the Roman Emperor. The comment is illuminating:

> Or, M. l'abbé Dubos prouve-t-il que les Romains, qui étaient encore soumis à l'empire, aient appelé Clovis? point du tout. Prouve-t-il que la république des Armoriques ait appelé Clovis, et fait même quelque traité avec lui? point du tout encore. Bien loin qu'il puisse nous dire quelle fut la destinée de cette république, il n'en saurait pas même montrer l'existence; et quoiqu'il la suive depuis le temps d'Honorius jusqu'à la conquête de Clovis, quoiqu'il y rapporte avec un art admirable tous les événements de ces temps-là, elle est restée invisible dans les auteurs. Car il y a bien de la différence entre prouver, par un passage de Zosime, que, sous l'empire d'Honorius, la contrée Armorique et les autres provinces des Gaules se révoltèrent, et formèrent une espèce de république; et faire voir que, malgré les diverses pacifications des Gaules, les Armoriques formèrent toujours une république particulière qui subsista jusqu'à la conquête de Clovis. Cependant, il aurait besoin, pour établir son système, de preuves bien précises.

Montesquieu's criticism is well founded. Ferdinand Lot, in *Naissance de la France* (Chapter 1), stresses the fact that the source material for this period is so limited that no precise conclusions can be reached as to the exact processes by which Clovis established his rule in Gaul. He writes: 'Nous ne pouvons nous faire

aucune idée de l'état politique où se trouvait la Gaule du Nord à la date de 486 [...] Entre la Seine et Loire, les cités dites "armoricaines" continuèrent-ils ce mouvement de révolte, de séparatisme même, dont il est fait mention jusqu'au milieu du Ve siècle?' (p.16). Lot says that the evidence for this possibility comes from a misinterpretation of a passage of Procopius, and comments: 'Le renseignement de Procope est précieux en ce sens que pour les Romains d'Orient, dès le milieu du VI[e] siècle, Francs et indigènes étroitement unis constituaient une puissance redoutable, mais pour suivre les étapes et la nature des conquêtes de Clovis après 486 il n'y a rien de sûr à tirer de là.' He adds that the later texts from the sixth and seventh centuries may indicate a degree of autonomy in Maine, Anjou and Poitou, particularly in the centre of the region and concludes: 'Peut-être avons-nous là la continuation d'un état de choses ancien, représentant des conventions passées par Clovis et ses successeurs avec les populations d'entre Seine et Loire. Mais ce sont là de simples conjectures.'

The long lived Magnus Aurelius Cassiodorus (468-562) was a statesman who served efficiently Theodoric the Great, king of the Ostrogoths and founder of the Ostrogoth monarchy in Italy. Montesquieu makes occasional references to his *Variae epistolae* in Book XXVIII, to illustrate relationships between the Ostrogoths and the Visigoths, and also to show some differences between the codes of law of the Goths and the Franks. He also added a paragraph to Book XXX, chapter 12, in the 1757 edition, arguing that Dubos was wrong to quote from Cassiodorus, and to instance the example of that part of Gaul which was under the domination of Theodoric, to show what happened among the Franks. The *Variae epistolae* are not at La Brède. Montesquieu may have borrowed them from the Oratorian library.

Agathias and Procopius of Caesarea both wrote in the sixth century. Montesquieu uses them in connection with their accounts of events in the reign of the emperor Justinian. Roman law as codified by the emperor was to exercise lasting influence in France and Europe generally, but his reign was also marked by the series of wars, conducted under his general Belisarius, against the Persians, the Vandals and the Ostrogoths. Procopius was secretary to Belisarius, and his accounts are naturally of particular interest. The army spent the year 535 in Italy fighting the Ostrogoths, and the history of Procopius includes some background information about the Barbarian peoples. Montesquieu uses these authors to illustrate the relationship of Barbarian peoples with the Roman Empire, and also to show the different methods adopted for dividing land after the invasions. Once again he takes issue with Dubos in Book XXX, chapter 12, on the question of whether the Barbarian peoples paid tribute to the Roman Empire, and he substantiates his argument from Procopius. The histories are included with those of Zosimus in the 1531 edition previously mentioned, which Montesquieu possessed at La Brède. We know, however, that he borrowed the works of Procopius, including the histories, in an edition of 1662/3, from the Bibliothèque du roi, on 5 January 1748, so it looks as if he wished to check his references.

Since the period covered by these Latin and Greek authors coincides with the establishment of the Frankish monarchy, and since Dubos had covered the ground very thoroughly when he composed his own account of the origins of

the monarchy, it is natural that Montesquieu and Dubos should quote from the same authors, while disagreeing on interpretation. These authors are valuable sources in themselves, but in connection with French civil and constitutional law their use can only be to give background information about the wider scene of the Roman Empire. Montesquieu seems to have used them with discretion for this purpose.

There remain to be mentioned some works of a legal character to which Montesquieu refers now and again in connection with the period of the first and second races. These include Brussel's *Nouvel examen de l'usage des fiefs en France*, published in 1727, Dumont's *Corps universel diplomatique*, published from 1726, and other works. These, however, are concerned with later periods also and it will be more appropriate to consider them at a later stage.

Looking back at the Merovingian and Carolingian periods, and remembering that Montesquieu's purpose was to consider how civil and constitutional laws developed in France, it seems that we can conclude that his documentation was ample and relevant to his themes. In the field of civil law, he presents the period as characterised by the introduction of the Barbarian codes of law, their coexistence with Roman codes, the metamophosis of Barbarian and Roman codes from personal to territorial law, and eventually the disappearance of any written general law, as wars, invasions, and the growth of the feudal system eroded the cohesion of the state.

Constitutionally, he presents the period as characterised by:

1. the swing of power from the monarchy established by Clovis to lords or *seigneurs* who received gifts of land, and the right of administering justice in that land, at first for life, and then in perpetuity;

2. the return to centralised power in the Carolingian dynasty, with the monarchy reaching its highest point of authority in the reign of Charlemagne;

3. the inexorable swing back to de-centralised power brought about partly by the personal inadequacy of Charlemagne's successors, but mainly by the spread of the feudal system;

4. the resulting anarchy in which a multitude of small, all but sovereign states existed within the kingdom of France until the union of the greatest fief with the crown produced the conditions for the monarchy to re-establish its influence.

For documentation, he has all the Barbarian and Roman codes, the capitularies or acts of the kings, the histories, chronicles, annals etc. composed by writers of the period, including historians of the later Roman Empire, the commentaries of scholars, and the aids to textual interpretation provided by Du Cange's *Glossarium*, and the historical writings of recent authors, including Boulainvilliers and Dubos.[21] With such documentation it seems reasonable to conclude that he was well equipped, at the time when he was writing to form his own theories about the development of civil and constitutional law in France, and indeed much of his work is endorsed by modern scholarship.

It seems appropriate to consider one other aspect of this matter of documentation. From time to time in this survey it has been mentioned that Montesquieu used, or at least had access to, the best editions which were available when he

[21] See chapter 10 below.

wrote. This certainly seems to be the case up to 1748 when *De l'esprit des lois* was first published. However, between then and 1755 when he died while preparing the revised edition, which appeared in 1757, three volumes of the *Recueil* were published: tome vi published in 1749 covers the period of Louis the Pious (Charlemagne's son and successor) up to the year 840, tome vii, published the same year, concerns the period of the sons and grandsons of Louis the Pious up to 877, tome viii, published in 1752, takes the story up to 987, the end of the Carolingian era.

According to dom Bouquet the material published in these volumes had been collected some time before. It is relevant to enquire whether, for the first edition of the *Lois*, Montesquieu took the step of consulting dom Bouquet about the material waiting to be published, and whether he consulted the three additional volumes of the *Recueil* when he was preparing the revised edition. So far as I know there is no evidence that he did either of these things.

Would it have been worthwhile to do so? Of course, if there had been any startling new revelations to come in the additional volumes, he would probably have heard something about them, for such matters were discussed in the academic and social circles of which he was an active member. In fact, though a great deal has been done in this part of the *Recueil* to bring together texts from a number of sources, and though a considerable work of collation and commentary has been achieved, there is not much really new material, and what there is does not seem very significant. One or two examples will illustrate this.

For the life of Louis the Pious, the *Recueil* gives again the accounts by Nithard, Thégan, and the 'unknown author', though a measure of the scholarship put into the collection may be seen from the fact that, just to take the case of the text by the unknown author, Duchesne's version has been collated with three manuscripts in the Bibliothèque du roi. One new source is an elegiac poem by Ernoldus Nigellus concernig the period 781-826, which was found in the library of the emperor at Ravenna. The existence of this poem was known, but the poem was not printed until Muratori got permission from the emperor Charles vi to include it in the second volume of the *Rerum italicarum scriptores*. The *Recueil* follows Muratori's edition. Montesquieu does not refer to this poem, though he could have come across it in Muratori's collection. In any case, though the text is of course interesting in itself, there is no suggestion that it significantly changes or adds to the knowledge previously available about Louis the Pious.

Montesquieu discusses Louis the Pious in chapter 20 of Book xxxi. His judgement is severe. The 1748 edition reads:

> Un prince, jouet de ses passions, et dupe de ses vertus mêmes; un prince qui ne connut jamais sa force ni sa faiblesse, qui ne sut se concilier ni la crainte ni l'amour; qui, avec peu de vices dans le cœur, avait toutes sortes de défauts dans l'esprit, prit en main les rênes de l'empire que Charlemagne avait tenues.
>
> Louis le Débonnaire mêlant toutes les complaisances d'un vieux mari avec toutes les faiblesses d'un vieux roi mit un désordre dans sa famille, qui entraîna la chute de la monarchie[22]

[22] Additions in the 1757 edition give instances of these weaknesses. The sources, all in Duchesne, t.ii, are: the unknown author of the *Life* of Louis the Pious, the procès-verbal

Dom Bouquet is more inclined than Montesquieu to give credit to Louis for his piety, but his verdict on the king in the Preface to t.vi of the *Recueil* (1749), though expressed more gently, is similar:

> Tant d'excellentes qualités furent un peu obscurcies par sa trop grande indulgence pour ses fils, par son trop grand amour pour sa femme Judith, et par sa trop grande négligence à arrêter les conspirations et à punir les conspirateurs: en sorte que s'il eut plus consulté les lumières de la raison que le goût de la dévotion, il eût régné plus tranquillement et plus glorieusement.

There is a question of some significance concerning the right to inheritance of the monarchy, concerning which Montesquieu seems to have a clearer historical insight than dom Bouquet. Bouquet writes in 1749, in connection with the division of the empire which Louis the Pious made in 817 between his three sons (*Recueil des historiens*, Preface, vi.xxvii-xxviii):

> De ces paroles de Louis: 'il est arrivé par la volonté de Dieu tout-puissant, que nos vœux et ceux de tout notre peuple concourussent à l'élection de notre cher fils aîné Lothaire,' et d'autres passages que Baluze ramasse, il paraît d'abord qu'on peut conclure que la succession de nos Rois au trône paternel dépendait anciennement des suffrages du peuple. Mais le même Baluze oppose à ces témoignages d'anciens auteurs et d'anciens Monuments, qui démontrent manifestement par des raisons fortes et convaincantes que le Royaume était dû aux fils des Rois par droit de succession, en sorte qu'il faut nécessairement que ce consentement du peuple s'entende, non pas de l'élection mais de la soumission, de l'obéissance et de la fidélité que le peuple promettait au Roi selon la loi de Dieu.

Montesquieu had devoted a chapter to the consideration of this subject, and concluded that in Carolingian times the people chose between the sons of the king (*Lois*, xxxi, 16):

> Le droit du peuple, dans cette race, était d'élire dans la famille: c'était à proprement parler, plutôt un droit d'exclure qu'un droit d'élire . . .
>
> Cette même disposition se trouve dans le partage que Louis le Débonnaire fit entre ses trois enfants, Pépin, Louis, et Charles, l'an 837, dans l'Assemblée d'Aix-la-Chapelle; et encore dans un autre partage du même empereur, fait vingt ans auparavant, entre Lothaire, Pépin et Louis. On peut voir encore le serment que Louis le Bègue fit à Compiègne, lorsqu'il y fut couronné: 'Moi, Louis, constitué roi par la miséricorde de Dieu, et l'élection du peuple, je promets . . .'. Ce que je dis est confirmé par les actes du Concile de Valance, tenu l'an 890, pour l'élection de Louis, fils de Boson, au royaume d'Arles . . .

His references are taken from Baluze, Goldast, and Dumont.

Jean Brethe de La Gressaye, basing himself on Chénon's *Histoire générale du droit français*, confirms Montesquieu's view of the matter:

> La couronne n'était pas héréditaire, cependant, l'assemblée des grands conservait le pouvoir de choisir entre les membres de la famille. Mais son pouvoir fut restreint par l'usage qui s'établit rapidement que le roi régnant désigna ses fils, partagea le royaume entre eux, et fit approuver de son vivant ses décisions par l'assemblée des grands. Cependant, à plusieures reprises, l'assemblée changea l'ordre de succession dans la famille, ou même élit un roi en dehors de la famille.[23]

of Louis's 'dégradation' and the *Life* by Thégan.

[23] *Lois*, Book xxxi, Note 50. See also chapter 2 above, p.37.

All it seems possible to say is that after the 1748 edition of the *Lois* Montesquieu may have seen the three volumes of the *Recueil* which appeared from 1749 to 1752. If so, he made no reference to them in the amendments to the revised edition of 1757.[24] Indeed, in chapter 20 of Book XXXI, in which he discusses Louis the Pious, the illustrations added to the 1757 edition are, as we have seen, taken from the version of the texts in Duchesne, not from the versions in t.vi of the *Recueil*.

It seems we may conclude that Montesquieu, while basing his line of demonstration on the original documents, was not attracted by the niceties of collating and editing texts. This seems more of a fault in our time than it did in his. That his account of the development of French civil and constitutional laws under the first two races is quite remarkable in its scope at the time, and is still so often valid, is probably due to two factors. Firstly, it is clear that, apart from the officially approved collections of André and François Duchesne, and the *Recueil*, great efforts had been made in the century or so before the *Lois* appeared to edit and publish the texts relating to French history. Montesquieu inherited, acquired, or borrowed a fairly comprehensive number of these texts in the best editions available up to 1748, though his references are not always to the latest versions. Secondly, there is Montesquieu's own historical sense which enabled him to reconstruct in his imagination the life of Merovingian and Carolingian society, to see what was probable in these circumstances and to reconcile apparently conflicting evidence. On the whole, it seems that he made the most of the source material available for these early centuries by interpreting codes, capitularies, charters, and chronicles in the light of each other. He made a quite remarkable effort to grasp and demonstrate, through an understanding of their early laws and customs, the spirit and nature of the French people.

[24] The amendments are listed in vol.ii of the edition of the *Lois* by Robert Derathé (Paris 1973).

9. Capetian period: evaluation of sources

WHEN Hugues Capet in the year 987 assumed the crown and so began the third French dynasty, which was to endure for eight hundred years, the kingdom was scarcely a state at all.

Montesquieu gives a description of feudal France just before the change in the dynasty (*Lois*, XXXI, 32):

> L'Hérédité des fiefs et l'établissement général des arrière-fiefs éteignirent le gouvernement politique, et formèrent le gouvernement féodal. Au lieu de cette multitude innombrable de vassaux que les rois avaient eus, ils n'en eurent plus que quelques-uns, dont les autres dépendirent. Les rois n'eurent presque plus d'autorité directe: un pouvoir qui devait passer par tant d'autres pouvoirs, et par de si grands pouvoirs, s'arrêta ou se perdit avant d'arriver à son terme. De si grands vassaux n'obéirent plus; et ils se servirent même de leurs arrière-vassaux pour ne plus obéir. Les rois privés de leurs domaines, réduits aux villes de Reims et de Laon, restèrent à leur merci.

By the union of the crown with the greatest fief under the new dynasty the monarchy was rescued from its state of impotence: Montesquieu does not continue the political history of France beyond this turning point, but he clearly thinks the change provided the monarchy with a power base which enabled it gradually to extend its influence in the rest of the kingdom.

The breakdown of civil law paralleled the breakdown in the constitution of the state (*Lois*, XXVIII, 9):

> D'ailleurs, la France se trouvant divisée en une infinité de petites seigneuries, qui reconnaissaient plutôt une dépendance féodale qu'une dépendance politique, il était bien difficile qu'une seule loi pût être autorisée. En effet, on n'aurait pas pu la faire observer. L'usage n'était guère plus qu'on envoyât des officiers extraordinaires dans les provinces, qui eussent l'œil sur l'administration de la justice et sur les affaires politiques. Il paraît même par les chartres, que lorsque de nouveaux fiefs s'établissaient, les rois se privaient du droit de les envoyer. Ainsi, lorsque tout, à peu près, fut devenu fief, ces officiers ne purent plus etre employés; il n'y eut plus de loi commune parce que personne ne pouvait faire observer la loi commune.

The weakness in the central power led moreover to perpetual war and disorder in the state, and the civilised arts of reading and writing were little practised, at least amongst the laity: 'Cela fit oublier en France et en Allemagne les lois barbares écrites, le droit romain et les capitulaires' (*Lois*, XXVIII, 11).

In Book XXVIII of the *Lois*, Montesquieu continues the history of the civil law of France beyond this point to show when and how it was revived. The gradually increasing power of the monarchy was a powerful factor in the revival of civil law in the kingdom. The interdependence of civil and constitutional law becomes apparent when we study the sources for this part of the work.

The story begins with the collections of customary law. The earliest of these date from the thirteenth century, or the end of the twelfth century. Their existence indicates that the ages of illiteracy were passing, and a need for consistency and order in the administration of the law was making itself felt, but it is accepted that these collections were merely records compiled by

individuals and did not in themselves have the force of law. Henri Regnault says:

> Le coutumier représente un ouvrage privé dans lequel un particulier, généralement un officier de justice, étudie les dispositions d'une ou plusieurs coutumes déterminées. Le trait essentiel est donc le suivant: l'auteur du coutumier n'a aucune qualité officielle pour constater la règle et son œuvre n'apporte en rien au juge ou au praticien la preuve officielle des dispositions coutumières.[1]

Regnault mentions the six principal 'coutumiers' (pp.118-20):

1. *Le Très Ancien Coutumier de Normandie*

It is thought, because of the repetitions and inconsistencies it contains, that this is a fusion of two texts. It was probably drawn up by a private individual, at the end of the twelfth or beginning of the thirteenth century.

2. *Le Grand Coutumier de Normandie* or *Summa de legibus Normaniae in curia laicali*

Regnault says that for a long time it was thought that this was drawn up between 1270 and 1275, but more recently, it is thought to be a composition of an even earlier date, between 1230 and 1240. The *Grand Coutumier* was the official 'custom' of Normandy and, according to Regnault 'reste le fond du droit appliqué dans les îles anglo-normandes'.

3. *Le Conseil à un ami*

This is the work of Pierre de Fontaines, who was 'bailli' of Vermandois and then Touraine, and who passed the years 1259 to 1266 at the court of Saint Louis. He is mentioned in Joinville's *Life of Saint Louis* as a friend of the king. It was thought at one time that the work had been drawn up at the king's request for the use of his son, and described the custom of the king's domain. This, however, is not the case, as *Le Conseil à un ami* in fact concerns the custom of Vermandois, which did not form part of the king's domain. It was probably written about the year 1253. Regnault adds': 'L'œuvre de Pierre de Fontaines n'est pas purement coutumière; souvent l'auteur se contente de paraphraser, quand il ne les traduit pas littéralement, des textes de droit romain. C'est l'observation que présenta déjà Montesquieu dans son *Esprit des lois*.'

4. *Jostice et Plet*

Nothing is known about the author of this work, which was probably composed between 1254 and 1260. Regnault says that it was a product of the 'école d'Orleans', and adds that a good deal of Roman law and Canon law is included, though not acknowledged, among the customary law.

5. *Les Etablissements de Saint Louis*

Regnault explains that:

> Depuis l'édition que Viollet a donné de cette œuvre,[2] personne ne doute plus qu'il ne s'agisse d'un coutumier. Les apparences pouvaient laisser croire à un texte législatif, mais cette opinion n'est pas reçue par les historiens du droit. Viollet a même pu établir les rapports qui existent entre les *Etablissements* et *Jostice et Plet*, les deux œuvres étant nées dans l'Orléanais, les deux auteurs ayant utilisé un coutumier antérieur, *l'Usage d'Orlenois*.
>
> Les deux coutumiers se rejoignent également dans cette idée que leurs auteurs ont

[1] Regnault, *Manuel d'histoire du droit français*, pp.117-18

[2] Published 1881

essayé d'harmoniser droit coutumier et droit romain. Mais les *Etablissements* représentent une œuvre plus savemment méthodique, le droit romain servant surtout d'appui, de justification aux principes coutumiers exposés.

Paul Viollet places the work at the period 1272-73.[3]

6. *Les Coutumes de Beauvaisis*

This is by Phillippe de Rémi, sieur de Beaumanoir. The author, born about 1250, was a man of many parts. He travelled to England and Scotland, composed two 'grands romans', *Manekine* and *Jehan de Dammartin et Blonde d'Oxford*, as well as the *Salu d'Amours*, before turning to administration as a 'bailli'. It seems that he drew up this account of the customs of Beauvaisis, which was his native home, at the request of Robert, brother of Saint Louis. This was probably in 1282, when he had been relieved for a time of his official duties because of maladministration. By 1284 he was back on duty in the service of the king in Poitou, but meanwhile the period of enforced leisure enabled him to produce a work of remarkable quality. Paul Viollet says that the *Coutumes de Beauvaisis* 'constitue l'œuvre juridique la plus originale, la plus remarquable de tout le Moyen-âge'.[4] Regnault comments:

L'ouvrage [de Beaumanoir], se réfère essentiellement à la coutume de Beauvaisis, d'où Beaumanoir était originaire. Mais, outre la connaissance profonde du droit appliqué de son temps devant les tribunaux dont il cite assez souvent les décisions, Beaumanoir a su s'élever plus haut que le simple exposé du droit usuel; qu'il s'agisse du pouvoir législatif, du servage, de la garde des églises, des rapports du spirituel et du temporel, il apparaît comme un théoricien hardi.

These then are the six principal thirteenth-century 'coutumiers' to have survived. It seems a quite remarkable instance of Montesquieu's expertise as a legal historian that, to support his line of argument in Book XXVIII, he refers frequently and directly to three of them, the *Conseil à un ami*, the *Etablissements de Saint Louis*, and the *Coutumes de Beauvaisis*.[5] He studied the first two 'coutumiers' in the best edition available, which was that published by Du Cange, with the *Life of Saint Louis* by Joinville in 1668. As we have seen, he borrowed this work from the Academy of Bordeaux, probably in 1743, and again from the Bibliothèque du roi on 2 January 1748, when he was actually preparing Book XXVIII of the *Lois* for the printers. We know that he used Du Cange for the

[3] See chapter 3 above for an appreciation by Emile Chénon of Viollet's edition of the *Etablissements*.

[4] M. Prévost, article on Beaumanoir, *D.B.F.*, v.1124-25.

[5] He followed in this the hint given by Du Cange in the 1668 edition of the *Etablissements* and *Le Conseil à un ami*. Du Cange says in his preface that he could have added a number of similar works as yet unedited, but the book was already long enough, so he decided that he must either produce separate editions (which he did not accomplish) or leave the task to others. He mentions a number of these works, still only in manuscript, and particularly praises the compilation by Beaumanoir:

'Mais entre les traités qui ont été écrits sur ces matières, le plus curieux sans doute est celui de Philippe de Beaumanoir [...] Ce volume est assez gros, et contient LXX chapitres qui traitent fort au long de diverses matières sur l'ordre judiciaire de ce temps-là, et avec beaucoup d'exactitude: en sorte que ce que Boutillier a écrit depuis en sa *Somme Rurale* n'est rien en comparaison de ce que se lit dans cet auteur.'

Etablissements in preference to, or as well as, the text in Laurière's *Ordonnances des rois de France de la 3e race*, published 1723 onwards, because he refers in chapter 37 of Book XXVIII to Du Cange's preface. Françoise Weil comments that 'Montesquieu n'a pu se contenter du texte publié par Laurière, car Laurière n'a pas réédité les commentaires de Du Cange.'[6]

He took the trouble to acquire the third of these important 'coutumiers', the *Coutumes de Beauvaisis*, for the library at La Brède in 1746/7. He acquired the first printed edition, which had been brought out by Thaumas de La Thaumassière in 1690. This was by no means a perfect edition[7] but A. Salmon, in his edition of 1899, regarded the first edition as very valuable. After having identified thirteen surviving manuscript versions of the *Coutumes*, and references to many others which have dissapeared, he writes:

> C'est à La Thaumassière que revient l'honneur d'avoir donné la première édition de ce grand ouvrage que parut en 1690. Cette édition n'a pas été surveillée avec assez de soin; elle n'est cependant pas aussi mauvaise qu'on s'est plu à le dire. La Thaumassière avait l'excellent ms A, le ms C et une copie de K. Il s'est servi presque exclusivement de C – ce qui explique le caractère picard de la publication, – mais il l'a souvent corrigé avec A avec beaucoup d'intelligence, et il a même fait au texte défectueux des rectifications ingénieuses. Ses annotations sont précieuses et rendent encore d'utiles services.[8]

In any case, no other edition was available to Montesquieu. The next, by the comte Beugnot, did not appear until 1842, and the very much revised version of 1899 was the third and, so far, the last edition of this important text.

In addition to the three compilations dating from the thirteenth century, Montesquieu makes use of some collections of customary law drawn up at a later date. He refers frequently to a work by Jean Boutillier, another 'bailli', first published in 1395. This is the *Somme rurale, ou le Grand Coustumier (générale de pratique) enrichi d'ordonnances et d'arrêts*, in the edition of 1603 by Louis Le Caron or Charondas. This work is in his library at La Brède and Montesquieu probably borrowed it from the Bibliothèque du roi on 27 April 1747. Jean Brethe de La Gressaye describes the *Somme rurale* as an 'essai de généralisation du Droit coutumier français d'après les coutumes d'Artois, de Normandie, de l'Orléanais, et les *Etablissements de Saint Louis*, ainsi appelée parce que l'auteur avait écrit simplement en praticien de village'.[9] According to the *Dictionnaire des lettres françaises* (moyen-âge), no later edition exists.

Montesquieu also refers to another work by La Thaumassière, the editor of Beaumanoir. This is the *Anciennes et nouvelles coutumes locales de Berry et de Lorris*, published in 1679. Gaspard Thaumas de La Thaumassière (1631 to 1702) was an advocate at Bourges and published several works about the customs of Berry and Lorris. The work mentioned was acquired for the library at La Brède in 1746/7.

[6] F. Weil, 'Les lectures de Montesquieu', p.504.

[7] M. Prévost in the article on Beaumanoir, *D.B.F.*, v.1123-24, calls the Thaumassière edition of the *Coutumes de Beauvaisis* 'fort défectueuse'.

[8] Philippe de Beaumanoir, *Coutumes de Beauvaisis*, éd. A. Salmon (Paris 1899), Introduction, p.xliv. (This edition is in the 'Collection de textes pour servir à l'étude et à l'enseignement de l'histoire').

[9] *Lois*, Book XXVIII, note 109.

The appreciation of La Thaumassière by Jean-Joseph Villaret is of interest. He says: 'La sûreté de sa documentation, autant que l'abondance de ses productions, honore la littérature régionale du XVIIe siècle. Tous ceux qui à sa suite s'intéressent à l'histoire du Berry ne peuvent se dispenser de recourir à ses ouvrages qui font autorité' (*D.L.F.*, XVIIe siècle, p.976). Again, speaking of the *Coutumes de Beauvaisis*, Villaret comments: 'En 1690, alors qu'il était bailli du Marquisat de Château-sur-Cher, que possédait le grand Colbert, il publia les *Anciennes Coutumes de Beauvaisis* et les *Assises de Jérusalem*: 'volume infiniment précieux pour la connaissance des lois et des usages, des mœurs et de la langue de nos pères au moyen âge'. Il accompagna cette publication de notes fort savantes et d'un glossaire' (p.976).

The part played by the compilation of these 'coutumiers' in the renaissance of French law is well explained in the *Lois*, as we shall see later in this chapter.

It is appropriate to mention here the *Livres des fiefs* or *Libri feudorum*, to which Montesquieu refers occasionally in Books XXX and XXXI, in connection with the inheritance of feudal lands. As has been mentioned in the chapter on sources for Books XXX and XXXI, this work, which is made up of several parts probably composed between 1095 and 1155, concerns the customs of Lombardy. Montesquieu uses the commentary by Jacques Cujas as a guide. Cujas, who lived from 1522 to 1590, was a famous legal scholar and professor of civil law. His works, in the second edition of 1604-06, were acquired for the library at La Brède in 1734-38.

Cujas practised at several provincial French universities, and also at Turin and Paris, before settling at Bourges from 1576 to the end of his life. Just before this final stage of his career he was authorised, by a decree of 2 April 1576, to teach Roman law at the University of Paris. Jean Malmezat says that this was an 'exception remarquable à la décrétale '*Super Specula*' qui prohibait cet enseignement à la première université française'. He comments on Cujas (*D.L.F.*, XVIe siècle, pp.208-209):

> Au lieu de continuer à adopter la méthode exégétique des romanistes du XIIIe siècle, Cujas étudie le Droit romain dans son milieu historique après avoir écarté gloses et commentaires, en replaçant les textes dans le temps et dans l'espace, et en les éclairant par l'histoire et la philosophie. De ces textes qui les dépeignent, Cujas dégage les institutions qu'il étudie dans leur cadre d'évolution.

That Montesquieu possessed and used the works of this famous scholar is evidence of his own scholarly approach to his subject matter.

He certainly knew of other compilations of customary law. Indeed, as part of his legal studies he had to be acquainted with the customary law of his time. Vian says: 'Cette étude comprenait les lois romaines, les canons de l'Eglise et toutes les coutumes de France qui étaient en vigueur selon les lieux; à quoi il fallait ajouter les commentaires en grec, en latin, en patois, et en français.'[10] One example of his study of customary law is still extant. In the last of the six manuscript notebooks which form the *Collectio juris*, there are extracts from the Custom of Brittany. These extracts come between the notes of a case, which Montesquieu presumably attended as an observer, at the Chambre des Requêtes

[10] L. Vian, *Histoire de Montesquieu*, 2nd edition (Paris 1879), p.21.

du Palais in Paris on 16 July 1711, and notes of a case heard in 1716 at the Chambre de la Tournelle in Bordeaux (see Appendix). Again, more than thirty years later, on 5 February 1747, he borrowed from the Bibliothèque du Roi a new work by le président Bouhier – *L'Histore de la Coutume du duché de Bourgogne*, published in 1742. No doubt these are just examples of his interest in the subject and many others could be found if his lost notebooks were available. For example, he mentions in passing in chapter 45 of Book XXVIII: 'l'assise de Geoffroi, Comte de Bretagne, les coutumes de Normandie, accordées par le duc Raoul; les coutumes de Champagne, données par le roi Thibault, les lois de Simon, Comte de Montfort, et autres'.

However, it seems that he made a judicious choice of examples to mention in more detail in the *Lois* – the *Conseil à un ami*, the *Etablissements de Saint Louis*, the *Coutumes de Beauvaisis*, the *Anciennes et nouvelles coutumes locales de Berry et de Lorris* and the *Livres des fiefs* – since the works in question, particularly the three thirteenth-century 'coutumiers', are still regarded today as necessary to the understanding of the development of French civil law.

We can look now at the sources Montesquieu uses when he refers to the revival of Roman Law. The 'coutumiers', including the *Livres des fiefs*, are evidence of the fact that customary law was very much influenced by Roman law. Montesquieu noted this in his comments on the individual works. Then in chapter 42 of Book XXVIII, there is a short account of the revival of Roman law and the results of this revival, and one sentence sums up his view of the overall position of customary law in relation to Roman law by the beginning of the fourteenth century: 'Philippe le Bel [Montesquieu's note: 'par une chartre de l'an 1312, en faveur de l'université d'Orléans, rapportée par Dutillet'] fit enseigner les lois de Justinien, seulement comme raison écrite, dans les pays de la France qui se gouvernaient par les coutumes; et elles furent adoptées comme loi dans les pays où le droit romain était la loi.'

Montesquieu's thinking was no doubt influenced by a work he possessed at La Brède on the history of Roman Law by Claude-Joseph de Ferrière. This was published in 1718, and so, as already mentioned, it must have been acquired after Montesquieu inherited the château and its library. The full title of the work is: *Histoire du Doit Romain contenant son origine, ses progrès, comment et en quel temps les diverses parties dont est composé le corps du Droit Civil, ont été faites; l'usage que l'on fait en France du Droit Romain, son excellence et la manière de l'étudier.*

There is a short summary of this work in the *Spicilège*.[11] The author, who lived from 1680 to 1749, was, like his father, well known for his writings on various aspects of law. The father was professor in the faculty of law at Paris and then at Rheims and the son was Dean of the faculty of law at Paris. At the time their works were very well regarded.

Chapter 26 of Ferrière's history is particularly significant in the context of the civil law in France. Here is set out, at length and with many authorities quoted, the theory that Roman law is 'raison écrite' and should be followed whenever customs or 'ordonnances' are insufficient. Ferrière also argues that many of the

[11] *Spicilège* 226 (ms pp.210-12), Nagel ii.758-59; Pléiade ii.1282-83.

customs forming part of customary law are derived from Roman law or follow it closely, and he adds:

> Au reste, quoique le Droit de Justinien ait été inconnu dans l'Occident jusqu'au temps de Lothaire, il faut absolument qu'il y ait été connu dans quelques endroits avant ce temps-là. En voici des preuves certaines. Dans les capitulaires de Charlemagne on trouve des termes de la Septième Novelle de Justinien, *De Rebus Ecclesiae alienandis vel non.* Charles le Chauve employa dans la réponse qu'il fit à la lettre du Pape Adrien II les termes de la Novelle 133 du même Empereur. Enfin Yves de Chartres cite dans son Décret les Livres des Pandectes, et y rapporte la définition des nôces, telle qu'elle est dans les Institutes, et même les termes du paragraphe 5 au titre des Nôces.[12]

Montesquieu does not pick up these specific references, but it is plain that the tenor of the argument is similar to his own in the *Lois*. All this line of thought is accepted today, according to a note by Jean Brethe de La Gressaye:

> Il est exact que là ou le Droit romain s'est maintenu et est devenu loi territoriale dominante (dans le midi de la France), ce n'était plus le Code Théodosien qui était perdu, ce n'était plus même le Bréviaire d'Alaric qui avait été délaissé pour les abréges, et ce n'était pas le Droit de Justinien qui était ignoré. Il ne restait qu'une pratique de Droit romain très déformée, mais cela suffit pour que le Droit de Justinien, quand il fut redécouvert au XIe siècle, fut considéré comme faisant suite à une tradition ininterrompue dans les pays du midi, et reçu comme s'il avait été en vigueur dès le VIe siècle, tandis que dans les pays de coutumes, au nord de la Loire, il ne fut regardé que comme raison écrite, comme un modèle de science dont on s'inspirait pour combler les lacunes du Droit coutumier.[13]

We need now to look at Montesquieu's sources for the other two factors which influenced the revival of civil law in France, namely the power of the kings and the increasing part played by the *parlements*. He points out that the written customary law for the various parts of France was a record of practices actually accepted at a given place and at a given time. The source of authority for the practices lay elsewhere. If any written authority, other than Roman law, existed, this would be an 'ordonnance' or 'établissement' of the king, or a 'chartre' granted by the king or the king's vassals or by Church authorities in their own domains. He explains very well, in chapter 45 of Book XXVIII, the sequence of events: 'Chaque seigneurie avait son droit civil, comme le dit Beaumanoir, et un droit si particulier que cet auteur qu'on doit regarder comme la lumière de ce temps-là, et une grande lumière, dit qu'il ne croit pas que dans tout le royaume il y eût deux seigneuries qui fussent gouvernées de tout point par la même loi.'

This civil law lived in the memory of the people but gradually written law was introduced in the following way:

> 1. Dans le commemcement de la troisième race, les rois donnèrent des chartres particulières, et en donnèrent même de générales [...] tels sont les Etablissements de Philippe – Auguste et ceux que fit Saint Louis. De même, les grands vassaux, de concert avec les seigneurs qui tenaient d'eux, donnèrent, dans les assises de leurs duchés, ou comtés, de certaines chartres ou Etablissements, selon les circonstances [...] Cela produisit quelques lois écrites, et même plus générales que celles que l'on avait.

[12] C. J. de Ferrière. *Histoire du droit romain* (Paris 1718), p.285.

[13] *Lois*, XXVIII, note 46. See also chapter 2 above, pp.27-28 and note 7.

2. Dans le commencement de la troisième race presque tout le bas peuple était serf. Plusieurs raisons obligèrent les rois et les seigneurs de les affranchir. Les seigneurs, en affranchissant leur serfs, leur donnèrent des biens; il fallut leur donner des lois civiles pour régler la disposition de ces biens. Les seigneurs en affranchissant leurs serfs, se privèrent de leurs biens; il fallut donc régler les droits que les seigneurs se réservaient pour l'équivalent de leurs biens. L'une et l'autre de ces choses furent réglées par les chartres d'affranchissement; ces chartres formèrent une partie de nos coutumes, et cette partie se trouva rédigée par écrit.

3. Sous le règne de Saint Louis et les suivants, des praticiens habiles, tel que Défontaines, Beaumanoir et autres, rédigèrent par écrit les coutumes de leurs baillages [...] Quoique ces auteurs particuliers n'eussent d'autorité que par la vérité et la publicité des choses qu'ils disaient, on ne peut douter qu'elles n'aient beaucoup servi à la renaissance de notre droit français. Tel était dans ce temps-là, notre droit coutumier écrit.

Kings had ceased to issue capitularies when they no longer had the power, under the feudal régime, to enforce them. The very gradual swing back to royal authority began with Hugues Capet, though it was to be some centuries before the king could command directly in matters of civil law except in his own domain. Montesquieu was able to consult a collection of royal decrees, concordats etc. made by the kings of the third race. This is the collection entitled *Ordonnances des rois de France de la 3e race*. Eusèbe de Laurière (1659 to 1728), who was an advocate in the *parlement* of Paris, received the commision from Louis XIV to publish these *ordonnances*, kept in the archives of the Louvre. He was personally responsible for the first volume only, published in 1723, and containing the *ordonnances* from 1051 to 1237. Six more volumes covering the period up to 1745 were published. Montesquieu makes a number of references to the collection towards the end of Books XXVIII and XXXI. Henri Regnault comments:

Si quelques textes législatifs émanant des grands féodaux ont été publiés [...] c'est uniquement en ce qui concerne les ordonnances royales qu'on peut parler de collection. La première, connu sous le nom d'*Ordonnances des rois de la troisième race* et qui comporte 22 volumes in folio a été entreprise sous les auspices de la chancellerie royale en 1713. Le premier texte donné émane d'Henri en 1051 et la collection se termine en 1514 à la mort de Louis XII. Elle est en voie de continuation par les soins de l'Institut de France.[14]

The other collection, the *Recueil des anciennes lois françaises* is better known under the name of one of its authors – 'Isambert' (François-André), who lived from 1792 to 1857. Of course this collection was not available when the *Lois* was composed, and Montesquieu relied mainly on the *Ordonnances*.

He also refers to various 'chartres' included in other collections. The works thus briefly mentioned seem to have been used, according to his usual practice, to supplement and check the information gained from his main sources. In Book XXVIII, chapter 29, he says that in the time of Saint Louis, the kings commanded by their sole authority in their own domains, but only by agreement with the barons for the rest of the kingdom, and he gives a footnote reference which mentions 'les chartres rapportées par M. Brussel'. As we have seen, Montesquieu took the trouble to consult the work by Nicholas Brussel, the *Nouvel examen de l'usage des fiefs en France pendant le XIe, le XIIe, le XIIIe et le XIVe siècle*, at the Bibliothèque du roi on 16 and 21 January 1747.

[14] *Manuel d'histoire du droit français*, p.122.

Three other references to 'chartres' are taken from a much earlier work, by Auguste Galland, which was added to the library at La Brède in 1746/7. Its full title is: *Du franc-aleu et origine des droits seigneuriaux, avec les lois données au pays d'Albigeios par Simon, comte de Montfort, l'an 1212; ensemble les usages et coutumes données par le Roi S. Louis à la ville d'Aigues-morte, l'an 1246, et les anciennes coutumes de Lorris données par le roi Louis-le-Gros.* It was published in 1637.

Here indeed is a fine set of miscellaneous information about conditions in twelfth- and thirteenth-century France. Montesquieu does not treat the *Du franc-aleu* as a major work of reference, but he uses it occasionally to support other authorities. In Book XXVIII, chapter 20, on the 'Origine du point d'honneur', he gives a footnote reference to Beaumanoir, and adds: 'Voyez aussi les Chartres de Saint-Aubin d'Anjou, rapportées par Galland p.263.'

Again in Book XXXI chapter 8, 'Comment les alleux furent changés en fiefs', he supports a reference to the 'chartres' quoted by Du Cange under the word 'alodis', by adding 'et celles que rapporte Galland, *Traité du franc-aleu* p.14 et suiv'. Once more in chapter 33 of the same book, 'Quelques conséquences de la perpétuité des fiefs', when he is discussing agreements concerning the inheritance of feudal lands, he supplies a footnote: 'On trouve, dans les chartres, plusieurs de ces conventions, comme, dans le cartulaire de Vendôme, et celui de l'Abbaye de Saint Cyprien en Poitou, dont M. Galland, p.55, a donné des extraits.'

One other source is also mentioned in connection with 'chartres'. This is the *Recueil des rois de France leur couronne et maison*, published in 1618, by Tillet or Du Tillet, a noted scholar and 'greffier' of the *parlement* of Paris. This was in the library at La Brède. The footnote reference in Book XXVIII, chapter 42, concerns a 'chartre' of the year 1312 and has already been mentioned in connection with Roman law.

When we come to the *parlements*, we find that Montesquieu does not spend much time in discussing their role. Two paragraphs in chapter 29 of Book XXVIII just indicate the part they played in the revival and development of civil law in France. As a lawyer and a former *président* of the *parlement* of Bordeaux he naturally was aware of the work of *parlements* as courts of justice in his own day. At La Brède he possessed twenty-one works catalogued under the title *Arrestographi*, though there is nothing published later than the seventeenth century. It is, of course, likely that he inherited many of these at the same time as he inherited, on the death of his uncle, the château of La Brède, with other property, lands and titles.[15] The references in this chapter show, however, that he took pains personally to become acquainted with the history of the *parlements* and their development.

There is a reference to the *Treize livres des parlements de France* by Bernard de La Roche-Flavin, which, as we have seen, he borrowed from the Bibliothèque du roi on 23 March 1748, and which was also available in the Oratorian library and the library of Barbot. La Roche-Flavin (1552 to 1627) was a *conseiller* and

[15] Only one volume, a *Recueil d'arrêts du parlement de Paris* published in 1644, is identified as having been added to the catalogue (no.873) by Secretary O in the period 1746/7. Other volumes of this *Recueil*, dated 1614 and 1661, are also in the catalogue.

later *président* at Toulouse, and the work in question was published first in Bordeaux in 1617 and then in Geneva in 1621. It was the Geneva edition which Montesquieu consulted in Paris. It is interesting to see that he knew this work, which is one of the first mentioned by Elie Carcassonne as influential in forming that strand of opinion in France which favoured the idea of *parlements* as a sort of senate, moderating between the king and his subjects, rather than just a tribunal of justice.[16] La Roche-Flavin describes how the rôle of the *parlements* developed, and in the *Lois* his work is mentioned only in connection with certain points of procedure. However, his theory concerning the need for a senate or *parlement* in France has links with Montesquieu's own theories concerning the moderate monarchy. La Roche-Flavin describes the *parlement* of Paris in these glowing terms: 'Et est ce Parlement le plus auguste Senat du monde, la meilleure partie de l'Estat, l'arbitre des Princes, le refuge de l'innocence, et la forte barrière entre la puissance des grands, et la foiblesse des petits, la source et fontaine des autres Parlemens; la clef de l'arcade, qui tient les coupes l'une à l'autre.'[17] Since the work was quite widely available it is very likely that Montesquieu had read it and taken some of the ideas into his own thinking, before he consulted it in Paris in 1748.

There are also a few references to the collections of judicial decisions of the *parlements*. In chapter 39 of Book XXVIII, there is a mention made of the *Olim* which, as we have seen, was a compilation of the decisions of the *parlement* of Paris, and an approving footnote was added to the 1757 edition drawing attention to the entry for the year 1313 in Hénault's '*Nouvel abrégé chronologique de l'histoire de France*'. Hénault's entry just says: 'Jean de Montluc, Greffier du Parlement de Paris, s'avisa le premier de faire des recueils de plusieurs arrêts qu'il fit relier ensemble, et qui se nommèrent *Regestum quasi iterum gestum* parce que c'était des copies; ils sont encore dans le dépôt du Parlement, et on les nomme les *Olim*'. The essential information is here. (Hénault seems to have been mistaken about the exact date, but this error has no bearing on Montesquieu's own line of thought). Henri Regnault includes the *Olim* amongst the principal collections of judicial decisions in the feudal period. He says: 'En 1283 le greffier, Jean de Montlucon, commença de tenir un registre des arrêts les plus importants rendus par la *Curia Regis*, en remontant dans le passé jusqu'en 1257. Le travail fut continué par ses successeurs si bien qu'en 1319, à la mort de Pierre de Bourges, il existait sept registres, dont quatre seulement ont subsisté.'[18] The origin of the title is uncertain; some say it comes from the fact the collection is very old and others from the fact that the second volume starts with the words: 'Olim homines de Baiona'.

It is apparent that the existence of these early registers was well known. Presumably they were available for consultation; indeed one of Fréret's unpublished manuscripts is entitled *Extraits des registres du parlement, Vol II des Olim.*[19] However, the *Olim* were not printed until the 19th century, when an edition by

[16] *Montesquieu et le problème de la constitution française au XVIIIe siècle* (Paris 1927), p.25.
[17] Quoted in the *Treize livres des parlements de France* (Bordeaux 1617), Livre XIII, p.681.
[18] *Manuel d'histoire du droit français*, p.121.
[19] C. Walckenaer, *Les Manuscrits inédits de Fréret*, p.17.

Beugnot appeared in four volumes from 1839 to 1848. Montesquieu does not make any specific use of the *Olim* nor of his own collection in three volumes of *Recueil d'arrêts du parlement de Paris*, but at the end of Book XXXI he refers very briefly to the collections of decisions of other legal bodies which had been printed and were in the library at La Brède. The *Décisions de la chapelle de Toulouse* is referred to with the name Aufrerius or Etienne Aufréri, the first editor, who was a professor at the University of Toulouse about 1483. The decisions are those of the archiepiscopal see of Toulouse and the reference in the *Lois* is to marriage contracts. The other collection is the *Anciens et nouveaux Règlements du parlement de Guienne*, by Boerius or Boyer, the first *président* of the *parlement* of Bordeaux, and relates of course to the decisions of the *parlement* of Bordeaux, properly known by the older name. Both of these collections were just legal works of reference.

Many of the sources for the re-emergence of civil law from the end of the twelfth century were written in French, but the language was very different from that current in the eighteenth century. Du Cange's Latin *Glossarium* needed to be supplemented by a glossary of French, but nothing of the kind existed on the same scale as the *Glossarium* of Du Cange at the time when Montesquieu was writing. As he probably knew, such a work was in preparation by one of his contemporaries, Jean-Baptiste de la Curne de Sainte-Palaye, who attended the college of the Oratorians at Juilly just after Montesquieu and who became a colleague of Fréret at the Académie des inscriptions. Sainte Palaye seems to have resembled Fréret in becoming overwhelmed by his own erudition. In 1756 he published the prospectus for his *Glossaire ou dictionnaire historique de l'ancien langage français*, which he described modestly in these terms:

> J'ai cru pouvoir composer, je ne dirai pas un Glossaire aussi savant et aussi bien fait que celui de Du Cange; mais du moins un ouvrage du même modèle: trop bien heureux de suivre de très-loin un guide qui marche à pas de géant, un savant universel qui par des travaux infatigables s'était approprié les connaissances de tous les siècles et de tous les pays.

In fact the first volume did not appear until 1789, the year of the Revolution. Men's thoughts were more in the present and the future than in the past so that the publication was not followed up till a century later. Sainte-Palaye's work finally appeared in ten volumes from 1875 to 1882.[20]

Montesquieu had to manage with what was available when the wrote. There was in existence a specialist glossary concerned with old French legal texts. The revised edition by Eusèbe de Laurière (the scholar later responsible for the first volume of the *Ordonnances des rois de France de la 3e race*) was published in 1704 in two volumes, and was based on a work compiled about a century earlier by François Ragueau. The full title of the 1704 edition is: *Glossaire du droit français contenant l'explication des mots difficiles qui se trouvent dans les ordonnances des rois, dans les coutumes du royaume, dans les anciens arrêts et les anciens titres, donnè ci'devant au public sous le nom d'Indice des droits royaux et seigneuriaux par M. François Ragueau.*

This is the work which was acquired for the library at La Brède in 1746/7. It is mentioned directly only once in the *Lois*, in chapter 41 of Book XXVIII: 'Flux

[20] For a full account of Sainte-Palaye's *Glossaire* and the delays in publication, see L. Gossman, *Medievalism and the ideologies of the Enlightenment* (Baltimore, Maryland 1968).

et reflux de la juridiction ecclésiastique et de la juridiction laie.' The reference concerns a decree by the *parlement* in 1409 against the bishop of Amiens, given as an illustration to the entry *Executeurs testamentaires*. The work was therefore used by Montesquieu as an additional source of reference on legal practice, as well as a glossary presumably.

It seems to have been with some regret that Montesquieu decided not to bring his study of French laws into modern times. He says at the very end of Book XXVIII, chapter 45: 'Il aurait fallu que je m'étendisse davantage à la fin de ce livre; et qu'entrant dans de plus grands détails, j'eusse suivi tous les changements insensibles qui, depuis l'ouverture des appels, ont formé le grand corps de notre jurisprudence française. Mais j'aurais mis un grand ouvrage dans un grand ouvrage.' Again at the very end of Book XXXI, chapter 34, he exclaims: 'Je finis le traité des fiefs là où la plupart des auteurs l'ont commencé.' Since so much of the groundwork relating to the collection, collation, editing and printing of manuscript material in the later period still remained to be done, it may be that to have taken the story further would have involved a quite unacceptable amount of research at the end of his long work. So far as he went, he seems to have made a wise choice among the texts available in print relating to the development of French civil and constitutional law. None of the works he mentions is in disrepute today and many of them are still regarded as indispensable to the understanding of the subject. It seems also that for his primary sources – customs, *ordonnances*, legal decisions – he used either the only or the best editions available at the time. So far as the development of civil law in the Capetian period is concerned, his oustanding achievements are to have put before his readers an account of the nature and development of customary law in France which is truly remarkable for its insight, and to have set this in the context of the legal system up to the fifteenth century, when the institutions of his own day were in process of formation.

10. Montesquieu's contribution to the historical and constitutional debate

In the previous chapters we have considered Montesquieu's theories concerning the history of French law in the context of *De l'esprit des lois*, his own development as a scholar, and the nature and extent of the research he undertook in this field. We have also looked at his sources and attempted to assess their value and relevance. In this final chapter I propose to look at what other scholars were saying in the first half of the eighteenth century and to arrive at some conclusions concerning the value of Montesquieu's contribution.

It seems that only a few serious scholars had attempted, before the publication of the *Lois* in 1748, to consider how French civil and constitutional law had developed. In part, the reason lies in the shortage of material. Up to about a hundred years previously, many of the fundamental texts were unpublished or published in very faulty editions. Right up to and beyond this time most scholars of French history devoted themselves to the work of retrieving, collating, and publishing texts. As we shall see, the censorship probably had something to do with this, but in any case the work of textual scholarship was both necessary and very demanding in itself. The editors of the great collections begun during Montesquieu's lifetime – Bouquet for the *Recueil des historiens*, Laurière and Secousse for the *Ordonnances des rois de France de la troisième race*, attempted little in the way of historical narrative. They provided the raw material for others to work on.

This is not to say that Montesquieu's work was entirely original. It was not, though he acknowledges very little debt to his predecessors. For the history of civil law it is reasonably certain that he used quite extensively the *Histoire du droit français* by the abbé Claude Fleury, though the work is not named in the *Lois*; for the history of constitutional law he tells us that he used the works of the comte de Boulainvilliers and the abbé Dubos and, though he disagrees fundamentally with their theories, it seems likely that he owed a lot to their erudition. There were also, of course, general histories of France – he names the *Nouvel abrégé chronologique de l'histoire de France*, by the *président* Hénault, and he must also have known, though he does not mention it, the standard *Histoire de France*, by le père Gabriel Daniel. In addition numerous works were published dealing with existing law in France in all its complexity. Quite a collection of these was in the library at La Brède and no doubt Montesquieu, with his legal training, used them to interpret the way in which the legal system had developed, but they were not histories. A good example is a work by Jean Papon, *Les Trois notaires*, not mentioned in the *Lois* but certainly consulted by Montesquieu, since he not only possessed it at La Brède, but also borrowed it from the Bibliothèque du roi on 21 March 1748.[1] This was published in 1580: the first volume deals with commerce, the second with justice, and the third with 'la puissance et droit de l'état du Prince'. The subject matter is very relevant to the historical books

[1] See above, Table 2, p.87.

of the *Lois* but Papon is setting out the law as it actually stood, not writing a history of its development. The more or less modern historians mentioned in passing by Montesquieu, other than Boulainvilliers, Dubos, and Hénault, historians such as Leibniz, Louis Legendre, La Roche-Flavin, and Machiavelli, were concerned with just one aspect of history which had some relevance to the development of civil and constitutional law in France but none of them, not even Leibniz, had made an extended treatment of the subject at all comparable to Books XXVIII, XXX and XXXI of the *Lois*.

Let us now attempt to identify the use Montesquieu made of his predecessors in relation to his own historical theories, and in so doing to gain some measure of the value and originality of the contribution he himself made.

Probably the most important reference for civil law was Fleury's *Histoire du droit français*. Professor Shackleton describes this fairly short treatise as the 'standard and recognised authority in Montesquieu's day, on the history of French law' (*Montesquieu*, p.325). He compares Montesquieu and Fleury in respect of the contribution they each made to throwing light on two matters which are fundamental to understanding civil law under the *ancien régime*. These are, firstly, the reasons why France was divided into *pays de droit écrit* where Roman law was dominant and *pays de droit coutumier* where customary law was dominant, and, secondly, the origins of French customary law. If we now look a little more closely, we shall be able to see the antecedents of some of Montesquieu's ideas and assumptions including some which have been much called into question.

The first edition of the *Histoire du droit français*, published in 1674 (without the author's name) was in the library at La Brède. When we study the catalogue we see that Montesquieu also acquired and entered in the list of titles in his own hand the fifth edition, published in 1730 of the *Institution au droit français* by Gabriel Argou which, like other editions of this work published from 1692 onwards, included a slightly amended version of Fleury's treatise as a preface. Montesquieu's knowledge of the *Histoire* would therefore be virtually certain, even without the internal evidence. I have compared the original version, republished in 1852 by Edouard Laboulaye as an introduction to Fleury's own *Institution du droit français*, with the version included in the eighth edition, published in 1753 of Argou's *Institution*. The references and quotations which follow, in this chapter, have been taken from the original version in the Laboulaye edition but these particular passages are only superficially changed, if at all, in the later version.

Claude Fleury lived from 1640 to 1723. He was one of the tutors of the French royal children and an author of distinction. He was probably best known for his *Histoire ecclésiastique*, but the short history of French law (it occupies only 70 pages in the Laboulaye edition) gives a taste of his quality, and is easy to read even today. He brings a cool, almost detached attitude to his subject, never exaggerates his knowledge and his style is clear and elegant. He makes use of few references and his object appears to be to summarise the existing state of knowledge without attempting to extend or re-interpret it, with the result that he can write about a subject much discussed – the relative authority of Roman and Customary law – in the following terms: 'De savoir si le droit romain est le

droit commun en pays coutumier, pour les cas qui ne sont point exprimés par les coutumes, c'est une question qui est agitée de part et d'autre par les savants des derniers temps, et je n'entreprendrai pas de la décider'(p.52).

Both Fleury and Montesquieu go back to the Barbarian invasions and both recognise that Barbarian codes and Roman law co-existed for a long time. They also both recognise that written law disappeared for a time in the later Carolingian and early Capetian periods, and that when it re-emerged Justinian's code had repaced the code of Theodosius as Roman law, the Barbarian codes remained dead and customary law existed all over France and was the dominant law in parts of it.

If we look at the earlier period, before written law disappeared, we can find some illumination on a question which has been much discussed by commentators of Book XXVIII of the *Lois* and other historians of French law, namely the 'personality' of laws and whether it was possible for men to choose under which law they would live. Montesquieu asserts that a choice was possible and this assertion is very important to the development of Book XXVIII. He goes on, as we have seen, to conclude that men tended to choose Salic law, where this law was current because it gave considerable advantages to those who lived under it, and hence Salic law became predominant in certain parts of France, whereas the Barbarian codes in other parts did not give advantages, and Roman law held its own and gradually predominated. These tendencies continued to influence the customs when written law disappeared and, as a result, when learning and written law re-appeared in France, Roman law quickly became predominant in parts of the country, while customary law, written down and partly harmonised, predominated in the rest of the country.

The basic premise of this analysis, the freedom after the Barbarian invasions to choose under which law one lived, has been questioned and indeed denied ever since Augustin Thierry wrote his *Considérations sur l'histoire de France* (1840). On the whole Thierry thinks highly of Montesquieu's theories as compared with those of Boulainvilliers and Dubos, but in the matter of freedom to choose one's law he certainly thought that Montesquieu was wrong and had led others astray: 'Il lui suffit de quelques lignes dans lesquelles il admet comme un fait historique le choix libre des lois personnelles sous la première et la seconde race, et donne à cette grave erreur l'immense autorité de son nom.'[2]

Thierry goes on to say that Montesquieu based his false premiss on two texts which he misunderstood. It seems useful to take another look at the matter. The first text is from the Salic law (Tit.XLIV, para 1) which reads: 'Si quis ingenuus Francum aut Barbarum aut Hominem qui lege Salica vivit occiderit, ducentis solidis culpabilis judicetur.' Montesquieu paraphrases and expands this text as follows: 'Quand on avait tué un Franc, un barbare, ou un homme qui vivait sous la loi salique, on payait à ses parents une composition de deux cent sous; on n'en payait qu'une de cent lorsqu'on avait tué un Romain possesseur' (*Lois*, XXVIII, 4). Thierry says that Montesquieu interprets this text as meaning that a man living under the Salic law need not necessarily be a Frank, whereas in

[2] J. N. A. Thierry, *Considérations sur l'histoire de France*, see *Œuvres complètes* (Paris 1851), iv.56.

the text itself the terms 'Francum', 'Barbarum' and 'Hominem qui lege Salica vivit' are really synonymous and the word 'aut' dividing them is either tautologous or a textual corruption. The second text is the constitution issued by Lothair in 824. Lothair, eldest son of Louis the Pious was crowned emperor by his father in 817 (the latter did not die until 840) and by the pope in 822. In the year 824, between the death of pope Pascal I and the election of Eugene II, there were great disorders in Rome. Lothair went there to restore peace and, with the agreement of the new pope, issued this constitution which declares, inter alia, that the Romans should be judged according to the laws they had chosen once for all. Thierry suggested that Montesquieu, when he mentions this constitution (Book XXVIII, Chapter 2), takes the word 'Romans' in the widest sense, as meaning subjects of the Holy Roman Empire, whereas it is plain that the text relates only to the inhabitants of Rome.

Later authors who have considered this question follow exactly the same line as Augustin Thierry. A good example is in the *Manuel d'histoire du droit français* by J. Brissaud, published in 1898 (p.57, note 3):

> Quelques textes mal compris ont suggéré l'idée du libre choix du droit. La loi Salique parle (41.1) du Franc ou du Barbare qui vit d'après la loi salique. On a cru qu'il s'agissait là, de deux classes de personnes, les unes d'origine salienne, les autres appartenant à quelque autre tribu barbare et ayant abandonné leur loi nationale pour la loi salique. Mais cette distinction n'est pas fondée. La loi ne parle que des Francs; on a dit: Franc ou Barbare vivant d'après la loi salique, comme on disait: pater vel genitor. Les tautologues de ce genre sont fréquentes dans les lois barbares (R. Sohn, *Procéd. de la L. Sal.* tr. Thévenin p.173). Une constitution rendue en 824 par Lothaire, fils de Louis le débonnaire, prescrit de demander aux Romains sous quelle loi chacun voulait vivre. Simple mesure de circonstance à l'effet de rendre plus facile la répression de délits. Cap. I 67, L5, Cap I 323.

Jean Brethe de La Gressaye, in his critical edition of the *Lois* is equally categorical (*Lois*, XXVIII, note 14):

> Montesquieu s'est trompé sur la portée de la personnalité des lois: elle n'allait pas jusqu'à permettre à chacun de choisir la loi sous laquelle il voulait vivre, la loi applicable était déterminée par la race. Augustin Thierry, le premier (*Considérations sur l'Histoire de France* chap.II) a réfuté Montesquieu en montrant la source de son erreur: la constitution de Lothaire (824) ne visait que les habitants de Rome, qui étaient appelés à dire sous quelle loi ils voulaient vivre, afin de faire cesser leurs démêlés avec le pape Eugène II, et non tous les Romains dispersés dans l'empire Carolingien.

It seems to be assumed that Montesquieu originated the idea of freedom of choice in this matter, and that he did so on the insufficient grounds of two misinterpreted texts. However, when we turn back to Book XXVIII of the *Lois*, the truth is rather different. He takes for granted as an accepted fact that freedom of choice existed concerning the law under which people lived in Merovingian and Carolingian times, and he cites texts not as proofs but as illustrations. In chapter 3 he refers to the provision in the Salic law quoted by Thierry and others, but he also refers to several similar provisions elsewhere in the Salic law, in order to demonstrate that this law, unlike the other Barbarian codes, distinguished strongly in favour of those who followed it as against those who lived under Roman law. The point is accurate in itself. In chapter 2 he mentions

that under the constitution of Lothair the choice had to be made in public, but he does not say that this particular constitution applied throughout the Carolingian empire.

The mistake, if it is a mistake, lies further back. Historians before Montesquieu appear to have accepted as historically certain that the freedom to choose one's law existed under the Merovingian and Carolingian dynasties until the disappearance of written law. Let us take Fleury first. The 1674 version (pp.10-11 in the Laboulaye edition), which is repeated substantially unaltered in later versions reads as follows:

C'était néanmoins encore deux peuples différents en langues, en habits, en coutumes; et leur distinction semble avoir duré en France pendant les deux premières races de nos rois, ou du moins jusqu'au règne de Charles le Simple. Mais cette diversité se conserva particulièrement dans les lois, et comme on était obligé de rendre justice à chacun selon la loi sous laquelle il était né, ou qu'il avait choisi (car ce choix était permis), on jugea à propos de rédiger par écrit les lois, ou, pour mieux dire, les coutumes des barbares.

Nor is any doubt shown on the subject in the official *Histoire de France* by the Jesuit father Gabriel Daniel. In the second edition, published in 1720, he is quite categorical. After discussing Salic law he writes (i.8.):

Les Gaulois eurent permission de vivre selon leurs lois: c'est-à-dire selon les lois romaines: néanmoins tous tant Français que Gaulois eurent la liberté de suivre ou la loi de leur nation ou la loi salique. mais ils étaient obligés une fois pour toutes de passer leur déclaration là-dessus devant témoins. Cette déclaration était enregistrée et il fallait s'y tenir, ainsi qu'on le voit en quelques endroits des capitulaires de Charlemagne: de sorte que dans la même province on suivait diverses lois: et comme dans la Bourgogne, après que les Français s'en furent rendu maîtres, il y avait des Gaulois, des Bourguignons et des Français, les lois de ces trois nations y étaient en même temps en usage.

If, finally, we look at the abbé Dubos's *Histoire critique de l'établissement de la monarchie française dans les Gaules*, first published in 1734, we find not only that the doctrine is accepted, but that he uses the two disputed texts, so that, in all probability, Montesquieu took these particular references from him. Jean-Baptiste Dubos, who lived from 1670 to 1742, perpetual Secretary of the Académie française, was a scholar of great repute in his own day. We shall consider the *Histoire critique* in more detail later in connection with historians of the French constitution, but here we can see an instance of how Montesquieu was influenced by Dubos's work although he disagreed with his theories. Towards the end of the *Histoire critique*, Dubos writes (t.iii, ch.17, pp.544-45):

On peut voir encore par différents endroits des Capitulaires, rapportées dans le premier chapitre de ce livre, que la distinction entre les Nations habitantes dans les Gaules, a subsisté jusqu'au règne des derniers Rois de la seconde race, bien qu'il fut permis dès le temps de la première, au Franc de se faire Romain, et au Romain de se faire Franc, ou de telle autre Nation qu'il lui plaisait, et que les autres Barbares eussent la même liberté. Cette liberté de changer ainsi de Nation paraîtra sans doute bizarre, mais les lois et l'histoire en font foi.

He then goes on to mention, as illustrations, the two texts – Salic law, Tit.XLIV, para.1, and Lothair's constitution of the year 824. His commentary on the constitution makes it quite clear that he did not fall into the error of thinking that it was of general application. He writes:

L'empereur Lothaire, petit-fils de Charlemagne, dit dans une loi faite véritablement pour l'Italie, mais dans laquelle ce Prince avait suivi les usages des Gaules selon l'apparence: 'Imperator Clotarius volumus ut cunctus Populus Romanus interrogetur quale lege vult vivere ut tali lege quali vivere professi sunt vivant, illisque denuntietur ut unusquisque tam judices quam Duces vel reliquus Populus sciant, quod si offensionem contra eandem legem fecerint eidem lege qua profitentur vivere subjaceant. *Lex Longobardorum*, Lib.II, Tit.57.'

Montesquieu's original contribution to this whole question is not linked to a misunderstanding of texts, but consists in the attention he drew to the favourable position of those who lived under the Salic law, and to his suggestion of a historical link between this fact, combined with the freedom to choose one's law (which he assumed to be a fact already accepted as proven), and the circumstance that in the France of his own time customary law was predominant in those areas where the Salian Franks had established themselves, and Roman law was predominant elsewhere. As professor Shackleton points out, the rejection of the freedom of choice theory is not unanimous among scholars. The Italian Muratori whose *Rerum italicarum scriptores* was, as we have seen, consulted by Montesquieu, held the same opinion as him on this subject, and professor Shackleton mentions later Italian scholars who have followed the same line (*Montesquieu*, p.328). There would, it seems, be advantages in re-examining the question with an open mind.

There are naturally many other correspondences between the accounts given by Fleury and by Montesquieu of the development of civil law in France, but it seems true to say that Montesquieu, as a result of his own considerable re-examination and re-interpretation of the published evidence, and with the help of his vivid historical insight, was able to throw light on much which remained obscure in Fleury's account, and to trace very convincingly the connection between two epochs which, for the earlier author, remained almost completely separate. In the *Histoire du droit civil*, modern French law, with its mixture of Roman and customary law, is portrayed as a new growth after the ages of ignorance and disorder which followed the break-up of the Carolingian empire. In Book XXVIII of the *Lois*, on the other hand, there is a picture of a natural evolution in civil law responding to changes in circumstances, but retaining the same spirit, from the Merovingian period up to that time in the Capetian period when the French legal system had assumed the shape it retained in the seventeenth and eighteenth centuries.

It seems worthwhile at this point to notice one interesting by-way which both Montesquieu and Fleury explored. This concerns the links between the feudal system, the age of chivalry and medieval romances. The idea occurs in the *Histoire du droit civil* and reappears, marvellously transmuted, in Book XXVIII, Chapter 22 of the *Lois*. Fleury writes in his cool detached way that, after the break-up of the Carolingian empire, the French fell back into a state of ignorance comparable to that of barbarians with neither laws nor organised government; even worse, they had retained the ferocity of their forebears, but not their simplicity and innocence. He adds (p.31):

De là viennent nos vieilles fables de ces félons qui insultaient aux faibles, qui forçaient les passages et empêchaient le commerce, et de ces preux qui erraient par le monde pour

la sûreté publique, et pour la défense des dames. Les auteurs de ces contes n'étaient pas fort inventifs, et tout ce qu'ils ajoutaient d'ornement étaient les géants, les enchanteurs et les fées.

It seems that this idea fired Montesquieu's imagination and led him to write his chapter 22, which is quite different in tone from the rest of Book XXVIII. He begins: 'Notre liaison avec les femmes est fondée sur le bonheur attaché au plaisir des sens, sur le charme d'aimer et d'être aimé, et encore sur le désir de leur plaire [...] Ce désir général de plaire produit la galanterie, qui n'est point l'amour, mais le délicat, mais le léger, mais le perpétuel mensonge de l'amour.' He then links this spirit of 'galanterie' with the custom of the 'combat d'honneur' and continues with a delightful passage, which is the counterpart and yet the contradiction of Fleury's analysis. Fleury suggests, as we have seen, that the writers of the old romances copied the society in which they lived – ignorant, disorderly and violent as this society was – and merely added some fairy-tale characters. For Montesquieu, these writers portray a new and wonderful world existing within the society of everyday. In this new world, the ideals of chivalry are embodied in marvellous, imaginary characters, men or beasts with more than ordinary powers, who serve and protect the weak:

De là naquit le système merveilleux de la chevalerie. Tous les esprits s'ouvrirent à ces idées. On vit, dans les romans, des paladins, des négromans, des fées, des chevaux ailés ou intelligents, des hommes invisibles ou invulnérables, des magiciens qui s'intéressaient à la naissance ou à l'éducation des grands personnages, des palais enchantés et désenchantés; dans notre monde, un monde nouveau; et le cours ordinaire de la nature laissé seulement pour les hommes vulgaires. Des paladins, toujours armés dans une partie du monde pleine de châteaux, de forteresses et de brigands, trouvaient de l'honneur à punir l'injustice et à défendre la faiblesse. De là encore, dans nos romans, la galanterie fondée sur l'idée de l'amour, jointe à celle de la protection. Ainsi naquit la galanterie, lorsqu'on imagina des hommes extraordinaires, qui, voyant la vertu jointe à la beauté et à la faiblesse, furent portés à s'exposer pour elle dans les dangers, et à lui plaire dans les actions ordinaires de la vie.

Without Fleury we probably should not have had this chapter, but Montesquieu's imagination and enthusiasm bring the subject alive and seem to lead the reader into the life of the middle ages, while Fleury remains a dispassionate observer.

We come now to the historical theory of the French constitution as described in Books XXX and XXXI of the *Lois*. The task attempted is to show the original characteristics or 'spirit' of the constitution and to account for the changes which had taken place in the way it functioned up to the beginning of the Capetian dynasty. It seems that when Montesquieu made this attempt he had very few predecessors and that only the two whom he himself mentions, the comte de Boulainvilliers and the abbé Dubos, can really be compared with him in this field. This is not to be taken as minimising the contributions of Bossuet and Fénelon to this question. The bishop of Meaux and the archbishop of Cambrai were indeed preoccupied with the idea of the French state, the question of fundamental laws and the rights and duties of the sovereign and the people. However, they approached these matters on theological and philosophical rather than on historical or legal grounds. As the absolute monarchy established its

hold over political life, historians and lawyers took a very cautious line on the subject of the French constitution. During the first half of the eighteenth century this caution was only gradually relaxed.

It must be remembered in this connection that state censorship existed and was a powerful influence on the written word. There were ways of avoiding the censorship, sometimes with the tacit consent of the authorities, the most obvious being to have one's work published abroad and quietly imported back to France, or even published in France under the imprint of a pseudo-foreign publisher and, of course, without the benefit of the *privilège*. Montesquieu followed both these expedients, like many other authors, but it was a tiresome business. Open publicity had to be avoided, and powerful officials placated. Work published in this clandestine manner was still liable to condemnation by the *parlements* and the Church. The work of some authors was never published or, as in the case of Boulainvilliers, not in the author's lifetime, though it was sometimes circulated in manuscript. Furthermore, where the censorship did not silence, it still influenced the work of authors with views to express about French society and institutions. In *Gil Blas* by Le Sage, published 1715-1735, criticism and satire are given a Spanish setting, in the *Lettres persanes*, published 1721, two foreigners do the talking, and in Voltaire's *Lettres philosophiques*, published 1734, England is often contrasted with France and conclusions are obviously indicated but not openly stated (this did not of course save the work from condemnation). These are only examples of a general tendency. One good reason why the editors of the state-subsidised collections of texts did not themselves write works of history is no doubt that they could not afford to express unorthodox views and risk losing their posts. Even as it was, the Jansenist ideas of dom Bouquet earned him a spell of exile and delayed the publication of the *Recueil des historiens* by several years.

Remembering the existence of the censorship and the work still to be done on the texts, we can understand why very few serious studies of the French constitution existed before the publication of the *Lois*, and why even Books xxx and xxxi of that work stop well short of modern times. Montesquieu concentrates in particular on the feudal system in relation to the monarchy. The theme running through his work is that the spirit of the French monarchy requires power sharing; he sets the powers exercised by the French *seigneurs* at various times within their historical context and he denies that these powers were in any sense usurped from the monarchy. Let us now see what other writers were saying.

It is safe to assume that the views expressed by Claude Fleury in the *Histoire du droit civil* and by Daniel in the *Histoire de France* were regarded as orthodox in the reigns of Louis xiv and Louis xv. Fleury has no doubt that under the French constitution the sovereign powers of justice, waging war and taxation, were vested in the king, and that the exercise of such powers by others was an act of usurpation and a symptom of weakness in the state. He writes (p.32):

tant que l'autorité royale fut en vigueur, principalement sous la famille de Charlemagne, il n'y avait point d'autre seigneur que le roi et la justice ne se rendait publiquement qu'en son nom et par ceux à qui il en donnait le pouvoir. Mais dans les temps de désordre chacun se mit en possession de juger, aussi bien que de faire la guerre, et de lever les

deniers sur le peuple [...] J'estime que les premiers que donnèrent l'exemple de cette usurpation furent les Comtes, qui étaient les gouverneurs des bonnes villes, et qui avaient déjà par le droit de leurs charges l'exercice de la jurisdiction.

It is clear that Fleury considers that the *seigneurs* had usurped the privileges they held, though he guards himself from incurring too much displeasure from the nobility by explaining that he is not saying that those privileges which still existed had not become legalised through the lapse of time and the approval given by the kings. Daniel, in his turn, looking back over a long perspective of history, attributes the failure of the Merovingian and Carolingian dynasties to: 'l'anéantissement de l'autorité royale dans les derniers rois de ces deux premières races'[3] and he describes the state of the kingdom under the first Capetian king in these terms (*Histoire de France*, p.322):

Tel était l'état de la France au temps que la troisième race de nos rois commença à y régner. Hugues Capet n'eut garde d'entreprendre de le changer. Il trouva tous ces ducs et ces comtes en possession de transmettre à leur postérité leurs duchés et leurs comtés, et d'avoir des vassaux, même avec qualité de comte, relevant immédiatement d'eux. Ce fut alors que plusieurs seigneurs qui n'étaient ni ducs ni comtes, commencèrent à se surnommer du nom de leurs terres et de leurs châteaux [...] Hugues Capet laissa tous ces ducs, comtes et seigneurs jouïr de leurs usurpations et de leurs prérogatives, qu'il n'osa leur disputer. Cette grande puissance dont ils s'étaient emparé, et qui les avait mis en état de lui donner la couronne, lui faisait craindre qu'ils ne la lui ôtassent, s'il entreprenait de toucher à leurs privilèges.

For both Fleury and Daniel then, any real power-sharing between the king and the other persons in the state is only a result and a cause of weakness. Neither of them have any conception of 'intermediate powers' between the monarch and the people.

The nobility, on the other hand, in Montesquieu's time, were conscious of all they had lost under the absolute monarchy, and they were seeking a new role for themselves in state affairs. As early as 13 March 1664 the 'ducs et comtes pairs de France' gave a commission to a historian, Jean Le Laboureur (1623 to 1675) to undertake research into the rights and privileges attached to their rank.[4] The result was an *Histoire de la pairie* which, presumably for reasons of prudence, was not published until 1740. The manuscript circulated however and Dodart, who supplied Montesquieu with books, brought it to his attention in 1723 (*Correspondance*, Nagel iii.752-53) so that though the published work is not in the catalogue of the library at La Brède, it seems likely that Montesquieu has seen Le Laboureur's account. To summarise this briefly, the author equates the Barbarian conquerors of France with the nobility, recalls the general assemblies of the first two dynasties in which the 'Grands du Royaume' deliberated with the king and voted on measures to be taken, but says that, since feudal times, the equality of all the nobility has changed and now only those great nobles, directly linked to the crown, equal between each other and superior to all others, retain the right to form the king's council. Faithful to his brief he asserts that

[3] Gabriel Daniel, *Histoire de France* (2nd ed. Amsterdam 1720), p.314.

[4] E. Carcassonne, *Montesquieu et le problème de la constitution française*, p.11.

un pair de France est la première personne de l'état après le roi par lui constituée, et nécessairement établie pour juge naturel de la succession, de la Couronne, des Nobles, et du Royaume, en toutes leurs causes réelles et personnelles, qui se poursuivent en la justice au Roi, et conseiller né de sa Majesté en tous ses conseils, seul nécessaire pour la réformation des lois de l'Etat, lequel par un privilège naturel, ne peut être jugé que par les autres pairs, ses pareils en dignité, dûment appelés et convoqués.[5]

Though the work remained unpublished for so long, it expressed ideas which were very dear to the nobility. At the beginning of the regency in 1715 an attempt was made by the Duke of Orleans to put them into practise. One of the principal influences on him was Saint-Simon (1675-1755), himself 'duc et pair de France'. In all, eight councils were established, of which seven, home affairs, 'conscience', war, marine, finance, foreign affairs, and commerce, reported to the 'Conseil général de Régence', presided over by the Regent himself. This was the famous system of the 'polysynodie', and the intention was to associate the old nobility with the government of France. In actual fact the personnel of these councils was very mixed. Members of the old nobility sat with members of the 'noblesse de robe' and with former ministers, secretaries of State and intendants often drawn from the third estate. The inexperience and incapacity of many of the nobles soon became apparent and they got bored with the business. There were dissensions also between the Councils and the *parlements*, especially the *parlement* of Paris. The experiment lasted a very short time; by 1718 the secretaries of State again reported direct to the Regent. The 'polysynodie' has been much criticised; it seems however that it was not really an attempt to put the clock back to feudal times, but rather an effort to find a better way of governing France than the absolutism of Louis XIV, an attempt which failed because it relied too much on the nobility as a natural governing class, whereas in reality the nobles had not been trained to govern and were no longer accepted as natural representatives of the nation.

Montesquieu himself gives a brief description of this episode in the 138th lettre persane, which is dated 1720, from Paris. Since the *Lettres persanes* was published in 1721, Montesquieu must in fact have been describing the events soon after they took place. In 1720-21 it was probably too early to assess the reasons for failure, but the analysis appears just, so far as it goes:

Dès que le feu Roi eut fermé les yeux, on pensa à établir une nouvelle administration. On sentait qu'on était mal, mais on ne savait comment faire pour être mieux. On ne s'était pas bien trouvé de l'autorité sans bornes des ministres précédents; on la voulut partager. On créa pour cet effet six ou sept conseils, et ce ministère est peut-être celui de tous qui a gouverné la France avec le plus de sens. La durée en fut courte, aussi bien que celle du bien qu'il produisit.[6]

The uneasiness of the old régime is here summed up in the one sentence: 'On sentait qu'on était mal, mais on ne savait comment faire pour être mieux.' The Regency councils were not the answer and Montesquieu was aware of the fact. Consequently, though himself a baron and a land-owner, he did not come under

[5] J. Le Laboureur, *Histoire de la pairie de France et du Parlement de Paris* (London 1740), ch.1, p.9.

[6] *L. P.* 138, Nagel iC. 278; Pléiade i.339.

the spell of aristocratic theories concerning the nature of the French constitution. He may have discussed such theories with Saint-Simon when he visited the latter in 1734, but the famous *Mémoires* were not published until many years later, after the Revolution. The author belonging to the aristocratic school, whose work Montesquieu certainly knew and appreciated, but with whose fundamental tenet he disagreed, was the Comte de Boulainvilliers. His *Histoire de l'ancien gouvernment de la France*, published posthumously in 1727, was acquired for the library at La Brède.

The constitutional theory of Boulainvilliers resembles that of Le Laboureur in the *Histoire de la pairie* and that which Saint-Simon was to expound in his *Mémoires*. They all go back to the Barbarian invasions and claim that the sovereign power was originally shared between the king and all members of the conquering nation, the Franks. Unlike the other two, Boulainvilliers, probably influenced by the fact that, although he was noble, he was not one of the 'ducs et pairs de France', does not recognise any contraction of the rights of the conquerors – according to him all their descendants, and not just a small number of great nobles, continue to share the sovereignty. From the point of view of the aristocracy (provided that their blood is pure), his views sound liberal. He describes the condition of the Franks before they invaded Gaul, and stressed that they were all essentially equal, companions of the king, not his subjects. He continues:

> Je ne veux pas inférer de là, que les particuliers ne devaient rien aux Rois: j'en conclus au contraire qu'ils leur devaient beaucoup; respect, assistance, concours, fidélité et obéissance: parce que tout cela se trouvait dans ce que les Français devaient à l'Etat, ne pouvant séparer le Roi de l'Etat, dont il est le chef, s'il ne renonce lui-même à cette union qui fait le titre de son autorité. Mais le Français n'en était pas moins libre pour cela; puisqu'il ne devait à la grâce du Roi ni sa liberté, ni ses possessions, ni l'indépendance de sa personne, ni la jouissance de ses biens, n'étant redevable de tous ces avantages qu'à sa seule naissance.[7]

Renée Simon has written an interesting account of this aristocrat and philosopher.[8] She emphasises that he was not just an aristocrat hankering futilely after lost glories, and that he recognised that the Third Estate had risen in the world and had no desire to alter this. The objects of his attack are the titles given out to commoners, the venality of offices and the supineness of the nobility who have let themselves be reduced to constitutional insignificance.

All the same, the view of the French constitution put forward by Boulainvilliers in the *Histoire de l'ancien gouvernment de la France* as well as in other works (none of which were published until after his death), is certainly injurious to the Third Estate, as Montesquieu recognises (*Lois*, xxx, 10) and equally certainly is based on an absurdly rigid view of history. For Boulainvilliers both conquerors and conquered retain their status after more than a thousand years of inhabiting the same country. He describes the process by which serfs became free and in some cases ennobled, without showing any sign of considering that the process was

[7] *Histoire de l'ancien gouvernement de la France*, i.33.

[8] *Henry de Boulainvillers, historien, politique, philosophe, astrologue*, Archives internationales d'histoire des idées (Paris 1973).

justifiable in any degree. The whole business appears to him as corrupt and contrary to the truth of the matter, so that he is moved to protest, and obviously with a deeply felt sense of grievance:

> plus de quarante mille familles, sorties la plupart de servitude, sont en partage des honneurs et des droits autrefois réservés aux seuls conquérants de Gaule. De sorte que, sans nulle attention à la vérité des faits justifiés par les titres et par l'histoire, il passe aujourd'hui pour certain que tous les hommes étant nés dans la condition du labourage, il n'y a de différence entre-eux que de l'avoir quitté plus tôt ou plus tard. Jusque là que Denis de Salvain, auteur estimé du dernier siècle, qui a traité de l'usage des fiefs, a même osé former la question si l'on prétendait que la Noblesse fût tombée du Ciel, et qu'elle pût avoir quelque privilège réel autrement que par la concession des Princes. Tant il est vrai que chez un peuple que fait profession d'ignorance, d'oubli et d'inattention, les choses les plus certaines deviennent non seulement douteuses mais tellement inconnues, que ceux qui les tirent de l'obscurité où elles périssent, sont en risque d'être regardés comme auteurs dangereux et amateurs de nouveautés.[9]

Fourteen years before *De l'esprit des lois* was published, another constitutional theory was put forward in a work which attacked Boulainvilliers on his own ground. This is the *Histoire critique de l'établissement de la monarchie française dans les Gaules*, by the abbé Dubos, which appeared in 1734. Dubos turned history on its head by denying that any conquest of Roman Gaul by the Franks had really taken place. This was a new idea, but the consequences which he drew from it were not injurious to the monarchy, and the work was published with the full 'privilège du roy'.

The *Histoire critique* was entered in the catalogue of La Brède soon after publication, and Book xxx of the *Lois* shows how closely Montesquieu studied Dubos's theory, though he disagreed with him even more fundamentally than with Boulainvilliers. To a certain extent Book xxx was written to refute Dubos, and seems to have succeeded in this aim, in the view of most historians.

A good account of Dubos and also, in connection with the *Histoire critique*, of the contemporary studies of the origins of the French constitution, can be found in the biography by A. Lombard.[10] Dubos (1670-1742) was a man of taste and erudition. He served the government of France in various capacities througout his adult life, first as a diplomat in the reign of Louis xiv, then as adviser on matters of state during the regency and finally, from 1722 until his death, as perpetual secretary of the Académie française. In each of these capacities he worked closely with ministers – with the marquis Colbert de Torcy in the last years of Louis xiv, with cardinal Dubois during the Regency, and with cardinal Fleury during the reign of Louis xv. He made a reasonably good income from ecclesiastical sinecures and from the system of payment for attendances at the Academy. When such a man examines the history of his own country, he is likely to look for reasons to justify the existing constitution, and this Dubos did, though there is no reason to doubt his good faith and academic honesty. He began his researches into the institution of the French monarchy, during the Regency, at a time when questions arose concerning the succession to the throne

[9] *Histoire de l'ancien gouvernement de la France*, p.318.

[10] *L'Abbé du Bos, un initiateur de la pensée moderne* (Paris 1913).

in the event of the death of the young king, Louis XV. Lombard comments (pp.147-48):

La Régence fut une crise grave pour la monarchie française. Préparée par le mécontentement général et par le mouvement d'idées auquel se rattachent Saint-Simon et Fénelon, la réaction aristocratique devint extrêment intense à la faveur des circonstances troublées que traversait l'Etat. C'est alors que le Régent institua la polysynodie. Mais le parlement intervint aussi dans les affaires de l'Etat, soutenu par la noblesse de province qui, déjà, réclamait les Etats généraux. En même temps, la question de la succession à la couronne restait posée. La santé du petit roi était si chancelante que toute la situation politique reposait sur l'hypothèse de sa mort. Qui sera l'héritier de la couronne, Philippe d'Orléans ou le roi d'Espagne? La renonciation de Philippe V est-elle valable? Et quelle est l'instance supérieure dont l'autorité pourrait, le cas échéant, lier la France à une nouvelle dynastie? Toutes ces questions se posaient à la fois [...] Dubos fut l'un de ceux qui [...] défendirent l'autorité royale contre les prétentions excessives des seigneurs en même temps que contre les intrigues espagnoles.

Dubos prepared a lengthy treatise on the succession to the Crown. He did not publish this, but developed it later into the *Histoire critique*. He believed that his researches had led to discoveries about the origins of the French monarchy which provided a better justification for the absolutist régime than the mere fact that it had existed for a long time. His work had an immediate success.

It was the fate of the *Histoire critique* to be almost eclipsed by Montesquieu's criticism, and the author himself receives scant justice from general biographers. Lombard writes (pp.469-70):

Ici, l'injustice de la destinée a été particulièrement notoire. Pour le public entier, à l'exception des spécialistes de l'histoire, et pendant près d'un siècle, l'énorme travail de Dubos a disparu dans quelques pages d'une critique spirituelle et sommaire. On ne se souvient guère de Dubos, et quand il arrive qu'on en parle, on l'abandonne aussitôt pour citer 'la brillante réfutation de Montesquieu ...'

'Bien que ce système [de Dubos] soit tout juste le contraire de la vérité, dit la *Nouvelle Biographie générale*, il a cependant rendu service à la science historique en suscitant la réfutation de Montesquieu.' Suit une citation de Montesquieu qui occupe le tiers de l'article 'Dubos'.[11]

Lombard would scarcely be more satisfied with the article by R. Limousin-Lamothe in the new *Dictionnaire de biographie française* (XI, 1967, p.1007). The comparison with Montesquieu is omitted, but the *Histoire critique* is dismissed as an 'ouvrage dont l'érudition n'est pas très sûre, mais qui eut pourtant de nombreuses ré-éditions.'

These various accounts do not really do justice either to Dubos or to Montesquieu. In the course of his biography Lombard shows convincingly that the *Histoire critique* was a work of remarkable erudition at the time. Dubos wished to oppose the aristocratic theory of Boulainvilliers and, seeing that the latter based himself on the conquest of Gaul by the Franks, he was inspired to search the records for an account of this conquest and, in so doing, convinced himself that it had never taken place. His new theory had important implications for the French constitution, as Lombard explains (p.423):

C'est alors que Dubos aperçut la possibilité d'anéantir d'un seul coup, avec cette conquête

[11] *N.B.G.* XL (1855), p.889.

même, toutes les prétentions, tous les privilèges, toutes les inégalités qu'elle paraissait justifier. Si les Francs sont entrés en Gaule, non en ennemis et en conquérants brutaux, mais en qualité d'alliés de Rome, s'ils n'ont rien enlevé aux habitants du pays, à aucun moment les nobles n'ont pu s'installer en maîtres dans les terres conquises, ni réduire les Gallo-Romains en servitude. Par conséquent, la noblesse ne saurait se réclamer de la conquête franque ni prétendre à un droit originel aussi ancien que la monarchie même. Si d'autre part, l'autorité de Clovis et de ses successeurs est une délégation ou un transfert de celle des empereurs, elle doit être nécessairement de même nature, et le despotisme est donc, non la suite d'une usurpation des rois, mais la loi fondamentale de la monarchie.

Dubos was certainly original in denying the fact of the conquest. In the preface to *L'Histoire critique* (t.1), he asserts the novelty of his theory and goes into some detail concerning the source of the alleged error. He traces it to a misinterpretation, in the seventh-century chronicle of Frédégaire, of the history of Gregory of Tours. He goes on to argue that the error remained uncorrected for so long, firstly because early historians and chroniclers were themselves very ignorant and uncritical, secondly because, before the invention of printing, they lacked the means to compare texts, and, finally, because even in modern times, the study of French history had been neglected in favour of Greek and Roman history. Some of his arguments are valid but he spoils his case by overstating it. Jean Brethe de La Gressaye sums up the view taken by historians today (*Lois*, xxx, note 16):

Les Francs n'ont pas réduit les Gallo-Romains en servitude, puisqu'ils les ont laissé jouïr de leur Droit privé, et, ultérieurement, quand s'est établie la féodalité, les seigneurs n'étaient pas nécessairement les descendants des Francs, car la fusion entre les races était déjà faite. Mais, d'autre part, les Francs ont bien été des conquérants, leurs rois ne se sont pas comportés en délégués de l'empereur.

He cites as authorities: Chénon, *Histoire générale du droit français public et privé*, no.66; Dumas, *Manuel d'histoire du droit francais*, p.21; and F. Lot, *Naissance de la France*.

Dubos's idea of the French constitution is just as mechanical as that of Boulainvilliers, although the two authors drew completely different conclusions from their researches. While Boulainvilliers sees an overwhelming conquest of Roman Gaul by the Franks, which established a permanent relationship of superiority of the victors over the vanquished, Dubos sees a peaceful transfer of power from the Roman emperor to the Frankish king, establishing a permanent dominance of the king over all his subjects, whether Gallo-Roman or Frank.

When we come to the discussion of the French constitution in *De l'esprit des lois*, we seem to enter a different world. Montesquieu has taken the immense mental step forward which enables him to see that, in the state which is France, the rights and duties of the sovereign and of other institutions and persons within the state, do not have one form or organisation which is correct and from which all deviations are unjust and wrong. Unlike Fleury and Daniel, he does not think that the powers which the seigneurs held in feudal times, and which were gradually taken over by the monarchy, had been usurped. He sees these powers as a natural accompaniment to the holding of land, so that the monarchy gradually lost power as land tenure became hereditary. The result was the feudal system which ultimately so weakened and divided France that the

monarchy merged with the strongest fief. Unlike Dubos, he accepts the evidence for the conquest of Gaul by the Franks and discards the fiction that the Frankish king inherited despotic power from the Roman emperor, but, unlike Boulainvilliers, he also discards the idea that the conquest resulted in a complete and permanent take-over by the Franks of all land and all power in Gaul. Montesquieu's own view of the French constitution is dynamic, as opposed to the static theories of his predecessors. He sees the beginning of it in German tribal organisation, originally a simple society composed of free men headed by a leader and his special companions. He sees this society responding to changed circumstances and developing into a complex organism. He observes the shifts in the balance of power, sometimes too centralised, sometimes too diffused, so that the free society and the moderate government, which, he considers, characterise the spirit of France, are in danger of turning into despotism or anarchy. He has what appears to be an unprecedented grasp of the nature of the historical development of the French state and the complex causes which have governed it.

Montesquieu did not take this step forward simply through the power of his wit and imagination. The 'quelques pages d'une critique spirituelle et sommaire' with which he dismissed Dubos were based on a profound study of the available sources. Indeed, so far as sources are concerned, the index which Dubos conveniently included in the third volume of the *Histoire critique* shows that for the period when the French monarchy was established in Gaul, that is, the time of the Merovingian dynasty, both Montesquieu and Dubos refer to much the same texts. Dubos is more concerned than Montesquieu with the earlier, Gallo-Roman period, and here his documentation is richer, though most of the works he mentions were in the library at La Brède. Montesquieu naturally refers to many works which illustrate the laws of the Carolingian and Capetian periods and which are not used by Dubos since they concern a period beyond the origins of the French monarchy.

In bringing this study to a close, we should remind ourselves again that in Books XXVIII, XXX and XXXI of the *Lois*, Montesquieu does not set out to write a history of French civil and constitutional law, but to establish historical theories of development which his readers may then extend for themselves. Given the state of studies in this field at the time, his contribution appears remarkable. This part of the great work seems to have been less understood and less influential than the rest. It is interesting to speculate what might have happened if he had revised and extended these three books, perhaps even brought them up to date and published them separately as a work of history. Even had he wished to do so, the need for very demanding new research and the constraints of the censorship would probably have prevented him. It was not to be, and the whole vast work, *De l'esprit des lois*, had such a wide success and commanded such a general readership, not only in France but in England, America and Europe also, that the success of the whole work has thrown into relief the difficulty of reading the historical books. To many general readers these appear too long, too stuffed with obscure references which they do not know how to set in context, and as a result very wearisome. An eighteenth-century critic is cited by Robert Derathé in the 1973 edition of the *Lois* (ii.549):

Parmi les gens de goût, il en est peu qui aient eu le courage de lire cette dernière partie, et ceux qui l'ont lue se plaignent de n'avoir pas pu l'entendre. . . Un mélange continuel de fragments de lois barbares et de pensées courtes et détachées, de textes obscurs et de commentaires profonds, fatigue l'attention la plus forte, et fait fermer le livre à chaque instant. Des traits lumineux, des expressions d'un grand éclat vous avertissent bien que vous marchez dans ces ténèbres à la suite d'un homme de génie, mais rien n'est éclairé; il crée la lumière et ne la répand pas sur les objets.[12]

Derathé himself continues: 'les critiques de Garat sont en grande partie justifiées. Il est certain que le lecteur se trouve perdu au milieu de la masse des citations ou des références'.

In spite of their difficulty, however, these books had and continue to have their influence. The relationship between French civil and feudal laws and the French monarchy is a question of continuing significance. The particular aspect which seemed most important at the time was the question of the origin of the monarchy. Jean Brethe de La Gressaye writes (*Lois*, xxx, note 16):

Montesquieu a pris part ainsi à une querelle qui s'est poursuivie jusqu'à ce que la Révolution l'ait rendue inutile en supprimant la monarchie. Et il en devint le centre. De nombreux auteurs ont disserté sur les origines de la monarchie française. Il n'en est guère qui aient appuyé Boulainvilliers à fond. La plupart se sont prononcés pour l'abbé Dubos (le président Hénault, Dupin, Linguet) ou pour Montesquieu (Jaucourt, dans l'Encyclopédie), tandis que d'autres étaient indépendants (d'Argenson, Mably). [...] La controverse a rebondi sous la Restauration, où de grands historiens au début de leur carrière, Guizot et Augustin Thierry, ont utilisé à des fins politiques (lutte de la royauté ou de la noblesse contre le peuple) l'ancienne opposition entre les Francs et les Romains [...] Ensuite, il y a bien eu encore deux écoles: l'école romaniste (Fustel de Coulanges) et l'école germaniste (Sohm, Sickel), voulant attribuer la prépondérance dans la formation des institutions politiques françaises à l'élément romain ou à l'élément germanique.

Ultimately, as we have seen earlier in this chapter, the view of modern French historians is close to that of Montesquieu.

In the period immediately following the publication of the *Lois*, the question of the origin of the French monarchy seemed so important because it was connected with the idea of the French constitution. As the century progressed the issue of the king's authority, as against all other bodies in the state, became a matter of the most urgent political significance. The continuing success of *De l'esprit des lois* with a wide public meant that Montesquieu's theories were widely known, if not fully understood, and had an influence in the debate. The nature of this influence has however been very much discussed.

At the beginning of the present study, we saw the connection between the theory of monarchy with intermediate powers, as the only practical alternative to despotism, in states of moderate size, and the account in the historical books of the *Lois* of the development of French civil and constitutional law. It is not in the historical books, but in chapter 22 of Book xx, 'Des lois dans le rapport qu'elles ont avec le commerce considéré dans sa nature et ses distinctions', that Montesquieu comes as close as he ever does to an assessment of the social and political organisation of France in his own time. As usual, his aim is to distinguish relationships within society, in this case relationships which are affected by

[12] Garat, *Mercure de France*, 6 August 1784.

commerce or trade. He notes the advantage of the incentive to productive work provided by the prospect of being able to buy a way into the privileged status of nobility. It is clear from his exposition that he sees a real difference between the nobility as an order and 'cet état de la robe qui se trouve entre la grande noblesse et le peuple; qui, sans avoir le brillant de celle-là, en a tous les privilèges; cet état qui laisse les particuliers dans la médiocrité, tandis que le corps dépositaire des lois est dans la gloire; cet état encore dans lequel on n'a de moyen de se distinguer que par la suffisance et par la vertu'. By contrast with this eulogy, his view of the nobility as an order, considered in the context of their contribution to the prosperity of the state, is quite cynical. The usefulness of the members of this order consists in their being ready to go to war so that no-one can say that they have not done so, in their spending the capital which goes with their status and then making way for others to do the same.

As we have seen, later on in the *Lois*, in Book xxx, he discredits the historical justification for absolute monarchy in France and also for the claim of the high nobility to be a natural and permanent governing class. Although he himself spoke of the 'corps dépositaire des lois' as only one of the intermediary powers necessary in a monarchy, it was perhaps inevitable that it was the *parlements* who claimed the support of his theories and saw themselves as the essential 'puissances intermédiaires'. After all, the *parlements* were actually the only official, lay, political bodies, other than the king, in France. However, they proved inadequate to sustain the role and it seems relevant, in considering Montesquieu's influence, to look at the reasons for their inadequacy.

One of the reasons was that their membership was drawn from too narrow a section of the population. To be an officer of the sovereign courts conferred noble status and privilege on the office holder, but in any case only a small minority were recruited to these offices from families not already noble. Recent studies have proved this beyond doubt. The *parlement* of Paris, betweeen 1715 and 1771 took only 9-10% of *roturiers*; out of 590 families who supplied magistrates to the *parlement*, 512 were noble before the magistrate took office and 35 of these belonged to the *ancienne noblesse*, assuming that that term applied to families whose proofs of nobility went back to before the sixteenth century. Where provincial *parlements* have been studied, the pattern is shown to be repeated.[13]

The distinctions drawn by Montesquieu are one proof that in eighteenth century France it was still felt that there was a difference between the *noblesse d'épée* and the *noblesse de la robe*. Nevertheless, in matters of privilege, their interests were identical. It is this which has led a number of historians to conclude, firstly, that the *parlements*, when they opposed the king's government, acted as a selfish oligarchy in defence of their own privileges, and, secondly, that Montesquieu's theories were really very akin to those of Boulainvilliers and tended to foster a feudal reaction against royal absolutism. This is the view taken by Albert Mathiez in his article 'La place de Montesquieu dans l'histoire des doctrines politiques au XVIIIe siècle'.[14] More recent exponents of this view

[13] Jean Egret, *Louis XV et l'opposition parlementaire 1715-1774* (Paris 1970), and William Doyle, *The Parlement of Bordeaux and the end of the Old Régime 1771-1790* (London 1974).

[14] *Annales historiques de la Révolution française* (March 1930), pp.97-112.

include Franklin L. Ford, in *Robe and sword*, and Arthur Cobban, in *A history of modern France, volume 1; 1715-1799*.

We need, however, to balance this assessment by considering the other main reason for the political inadequacy of the *parlements*. This is the fact that, as we noted in chapter 1, their non-judicial functions were entirely negative. A parallel would be if in England now the legislative and executive functions were the personal responsibility of the queen or of ministers appointed by and responsible only to her, no House of Commons existed, and the House of Lords had power only to remonstrate and delay action, without even the right so see how the national budget was drawn up. In such circumstances, and particularly when additional taxes were being proposed during times of economic and financial difficulty, the Lords would certainly use their powers of remonstration and delay to the full. To the queen's ministers they would appear as obstructive nuisances, to historians perhaps as a selfish oligarchy, but to themselves, and quite possibly to many of their suffering fellow citizens, they would appear as spokesmen against oppression.

A brief consideration of the parlementary crisis of 1770-71 will help us to understand how the *parlements* saw their own political role, and the extent to which their view corresponded with that of Montesquieu. While France was in the grip of severe financial and economic troubles, the *parlements* refused to register edicts imposing new taxes, repudiating public debts and suspending payment of interest. They then refused to approve edicts limiting their own powers, with the result that Louis XV held a *lit de justice* on 7 December 1770 to enforce registration. In the build-up to this situation the *parlement* of Paris, on 3 December 1770, approved a remonstrance which begins:

> La Cour, toutes les chambres assemblées, délibérant à l'occasion de la séance du Roi tenue en son parlement le lundi 3 du présent mois;
>
> Considérant que la multiplicité des actes du pouvoir absolu, exercés dans ce moment contre l'esprit et la lettre des lois constitutives de la monarchie française et certainement contre le vœu intime dudit Seigneur Roi, sont une preuve non équivoque du projet prémédité de changer la forme du Gouvernement et de substituer à la force toujours égale des lois les secousses irrégulières du pouvoir arbitraire . . .[15]

The remonstrance continues with the assertion that the *parlement* is carrying out its constitutional role as guardian of the fundamental laws of France and a reminder to the king that one of the constitutional laws so guarded is that which preserves his own right to the throne and the succession of his heirs. From the accounts of events at the *lit de justice* itself, at which the king appeared in severe majesty, accompanied by the princes of the blood, the peers and the chief ministers, including the chancellor Maupeou, the *parlementaires* seem to have been overawed by the occasion and had little to say beyond professing obedience, but they brought continuing pressure to bear by refusing to transact legal business. After this provocation the chancellor had no difficulty in getting the king's consent, by a decree of January 1771, to send members of the existing *parlement* of Paris into exile and to the setting up, by a decree of April 1771, of

[15] Jules Flammermont, *Remontrances du Parlement de Paris au XVIIIe siècle: iii. 1768-1788* (Paris 1898), p.157.

a new *parlement* with different personnel and different terms of reference. These measures were later extended to the provincial *parlements*.

It would be according undue influence to Montesquieu's theories to say that they were the inspiration of the *parlementaires* in this trial of strength. The remonstrances of the *parlement* of Paris at this period do not invoke his name. Similarly it is, I suggest, quite anachronistic to describe him as a leader or advocate of parlementary revolt, still more as the leader or advocate of a noble or feudal reaction against the king. It does however seem true to say that in so far as the *parlementaires* genuinely looked upon themselves as guardians of the laws of France, with a duty and a right to supervise the legislative process, their views were in accordance with those of Montesquieu, and *De l'esprit des lois* probably had an influence on them.

Were the *parlementaires* genuine or were they just a selfish oligarchy, acting in defence of their own class? Some historians are now beginning to show a greater understanding and acceptance of their motives, and the extent to which, whatever their deficiencies as representative bodies, they really spoke for the nation. Jean Egret, for example, writes:

> Les apologistes du coup de force de 1771 – et après eux nombre d'historiens – n'ont voulu voir dans l'opposition parlementaire aux volontés du Gouvernement qu'une défense sournoise de privilèges personnels ou corporatifs, dissimulée sous des prétextes illusoires de bien public.
>
> Cette interpretation – devenue traditionnelle – ne résiste pas à l'examen. Les Parlements n'ont pas trompé l'opinion; ils ont été les serviteurs souvent défaillants de l'opinion, qui ne les a soutenus que lorsqu'ils défendaient l'intérêt de tous . . .
>
> Derrière l'action parlementaire, on découvre toujours l'influence d'une opinion locale ou nationale plus ou moins organisée et plus ou moins puissante. Cette influence s'exprime dans les brochures des polémistes – dans les clameurs dont retentissent les galeries du Palais, lors des Arrêts mémorables – dans les témoignages de reconnaissance, d'une évidente sincérité, auxquels donnent lieu les retours triomphaux des Cours exilées pour la cause commune. Aux appels de l'opinion, les Parlements répondent – en publiant leurs Remontrances et le récit de leurs démarches – par de véritables comptes rendus de mandat.[16]

After 1771, the old régime had only a short time to live. Louis XVI came to the throne in 1774 and during the first two years of his reign re-established the old *parlements* both in Paris and the provinces. He and his new chancellor, Maurepas, were, it seems, activated by a desire to please public opinion and in this they succeeded for a time. The *parlements* returned to public rejoicing, but another severe economic and financial crisis occurred in 1787, and once again they blocked the measures proposed by the king's government. After trying the intermediate experiment of an Assembly of Notables, the government yielded to the popular demand, led by the *parlements* themselves, for the summoning of the States General. It was the prelude to Revolution and soon *parlements*, States General and the monarchy itself were all to be superseded by new institutions.

At the end of Chapter 1, I suggested that Montesquieu would not have been

[16] Jean Egret, *Louis XV et l'opposition parlementaire*, pp.230-31. See also articles by J. F. Bosher, 'The French crisis of 1770', *History* 57 (1972), pp.17-30, and W. Doyle, 'The Parlements of France and the breakdown of the Old Régime', *FHS* 6 (1970), pp.415-58.

surprised at the fact of Revolution. From the 'polysynodie' experiment of 1715 and thereafter throughout the unending struggles between the king's government and the *parlements*, the French monarchic state showed that it was unable to adapt its political institutions to the needs of the time. This was not the fault of the kings and their ministers only; the *parlements* obstructed the government of the country. It has to be remembered however that, in political terms, the negative role was all they had to play.

It is sometimes said that the insufficiency of the *parlements*, the ease with which they were disbanded in 1771, and the consciousness of their own weakness which induced them to demand the summoning of the States General, are proofs of the inadequacy of Montesquieu's theory of the need for intermediate powers in a monarchy. William Doyle, for example, writes:

> In the view of Montesquieu there was the further restriction [on the power of the king of France] of the 'intermediary bodies', repositories of the fundamental law. The most important of such bodies were the parlements, with their rights of registration and remonstrance, through which they kept the king acquainted with the fundamental laws. Naturally the parlements themselves shared these views, and, until 1771 at least, so did many of the political nation. It was no theorist, but Maupeou, who really demolished Montesquieu. He demonstrated the practical weakness of the intermediary bodies by showing them how easily the goverment might override them, and it was from this time that men began to turn their thoughts towards more tangible and permanent checks on governmental power.[17]

It is surely, however, an over simplification to regard 'intermediary bodies' in Montesquieu's theory as identical with the *parlements*. He certainly thought that the monarchy needed 'les corps qui ont le dépot des lois', but he also advocated other powers, specifically the nobility, the clergy, the towns, the army. He saw safety for the king and the people in sub-division of the sovereign power. As we have seen in chapter 1 above, these ideas are fundamental to his political philosophy. It may be helpful to consider some illustrations.

In chapter 4 of Book II he mentions certain intermediary bodies: the nobility, the clergy and the 'corps politiques' which, in France, were the *parlements*. He describes the nobility as 'le pouvoir intermédiaire subordonné le plus naturel'. Then he speaks of the clergy and, despite some reluctance ('je ne suis pas entêté des privilèges des ecclésiastiques'), it is clear that he sees them as a defence against despotism: 'Autant que le pouvoir du clergé est dangereux dans une république, autant est-il convenable dans une monarchie, surtout dans celles qui vont au despotisme.' He says of the 'corps politiques': 'Il ne suffit pas qu'il y ait, dans une monarchie, des rangs intermédiares; il faut encore un dépot des lois. Ce dépôt ne peut être que dans les corps politiques, qui annoncent les lois lorsqu'elles sont faites et les rappellent lorsqu'on les oublie.' In chapter 16 of Book V, Montesquieu also mentions the towns and the army as intermediary powers, though he does it obliquely by contrasting the limited power exercised by governors and officers in a monarchy, where they share authority in a limited way with the king, with the absolute power exercised in a despotism by their counterparts. These latter have no separate, though subordinate, authority, but are an extension of the despot:

[17] *The Parlement of Bordeaux and the end of the Old Régime*, p.217.

Dans le gouvernement despotique, le pouvoir passe tout entier dans les mains de celui à qui on le confie. Le vizir est le despote lui-même; et chaque officier particulier est le vizir. Dans le gouvernement monarchique, le pouvoir s'applique moins immédiatement; le monarque, en le donnant, le tempère. Il fait une telle distribution de son autorité, qu'il n'en donne jamais une partie qu'il n'en retienne une plus grande.

Ainsi, dans les états monarchiques, les gouverneurs particuliers des villes ne relèvent pas tellement du gouverneur de la province, qu'ils ne relèvent du prince encore davantage; et les officiers particuliers des corps militaires ne dépendent pas tellement du général, qu'ils ne dépendent du prince encore plus.

It is at least arguable that Montesquieu was quite right, and that what went wrong in eighteenth century France was that the power was not effectively subdivided, with the result that no-one other than the king and his ministers had any positive responsibility for running the country, and the king and his ministers could not command the confidence of the people.

In 1976 an American author, Mark Hulliung, took a fresh look at Montesquieu as a political thinker in his book *Montesquieu and the Old Regime* (Berkeley, California). The approach is politico-sociological in a historical setting. In note 1 to the Prologue (p.231), the author contrasts the view of Montesquieu as a 'feudal reactionary' taken by certain authors,[18] with the older understanding of him as an 'aristocratic liberal'.[19] Hulliung himself claims (Preface, p.ix) that Montesquieu was one of the great political thinkers, 'a foremost detractor of the old régime and the proponent of a radical alternative'. This is only one in the long line of reappraisals of Montesquieu's theories. The interest they arouse has lasted for well over two hundred years and seems likely to continue. Quite recently William Doyle has said that 'in Montesquieu the parlement of Bordeaux produced the most influential political writer of the century.'[20] My own study has concentrated on his work as a historian of French civil and constitutional law, but the history is an aspect of the political philosophy. The formation of the French state is shown as a working model of moderate monarchy. Montesquieu does not claim that it is the only right model, he notes the imperfections of various stages of development, and he leaves the story unfinished for his readers to continue for themselves. In the three historical books he writes very much in the style of a scientist demonstrating a theory, and the reader who takes the trouble to follow him will probably admit that he makes a good case. I hope that my study will help such a reader to make his way through 'la masse des citations ou des références', to understand the extent and the value of the documentation, and so arrive at a better appreciation of Montesquieu's political thought, seen in the context of the historical development of his own country. I have personally found both interest and excitement in following the great man in his researches, and in finding the theories of *De l'esprit des lois* illuminated and

[18] Ford, *Robe and sword*; F. Neumann, 'Montesquieu', ch.4 of *The Democratic and the authoritarian state* (Glencoe 1957); Mathiez, 'La place de Montesquieu dans l'histoire des doctrines politiques du XVIIIe siècle'; L. Althusser, *Montesquieu, la politique et l'histoire.*

[19] Carcassonne, *Montesquieu et la constitution française*; J. J. Chevalier, 'Montesquieu ou le libéralisme aristocratique', *Revue internationale de la philosophie* 9 (1955), pp.330-45.

[20] *Origins of the French Rvolution*, p.126.

brought to life by reference to the state of France itself, at this most significant time, the century which led up to the Revolution.

Appendix: the *Collectio juris*

THE six unpublished notebooks which form the *Collectio juris* bear few marks of Montesquieu's personality, yet they are of interest at least as providing evidence of his methods of study at an early period of his life, and as an indication of the type of aide-mémoire on law and legal practice in France which he thought it worthwhile to preserve. It is hoped that this study will show that they have also other claims on our attention.

The manuscript notebooks, which are of quarto size, are in the Bibliothèque nationale (n.a.f. 12837-42). They are mentioned briefly in the Nagel edition of Montesquieu's works (iii.716) and in Robert Shackleton's *Montesquieu* (pp.17-18), but little information is given and it seems worthwhile to examine them more closely, to set them in context, and to see what can be learnt from them.

The notebooks are almost entirely in Montesquieu's own hand-writing. The spelling, particularly in the accounts of law cases, which were probably jotted down almost immediately after the hearings, is more than usually erratic. Capitals are seldom used, and punctuation is very rudimentary. I have, therefore, for ease of reading, modernised and punctuated the quotations from the *Collectio juris*.

It seems certain, from the subject matter and the dates of the cases, that the collection was begun in 1711 or earlier, at a time when Montesquieu was not yet in the habit of employing secretaries, and that it continues at least to May 1721, and probably a short time after. The notebooks show him as a student of law, and, in the sixth volume, also as an observer and practitioner in the field. They are a valuable source of information, even though unfortunately much less ample than we could wish, of one particular aspect of this many-sided man's life. While he made these notes he was, at first, living in Paris society and cultivating links with Desmolets, Fréret, and Hoang, among others. Later he was in Bordeaux, not only practising as a lawyer and magistrate, but also taking a leading part in the work of the Academy, as well as entering on family life and assuming his responsibilities as a landed proprietor. During the same period, he must have devoted a lot of his spare time to the *Lettres persanes*. The *Collectio juris* belongs to Montesquieu's professional life before he became famous.

The first five books and half the sixth bring to life the abbé Guasco's well-known anecdote:

> Il [Montesquieu] a dit à quelques amis que s'il avait eu à donner actuellement ses lettres [this was in connection with a proposed new edition of the *Lettres persanes*], il en aurait omis quelques-unes, dans lesquelles le feu de la jeunesse l'avait transporté; qu'obligé par son père de passer toute la journée sur le Code, il s'en trouvait le soir si excédé, que pour s'amuser, il se mettait à composer une lettre persane, et que cela coulait de sa plume, sans étude.[1]

This term, the *Code*, is habitually used to describe the whole of the legal work

[1] Guasco, *Lettres familières* (1767), pp.187-88. Note on a letter of 4 October 1752 from Montesquieu to Guasco.

of Justinian – the Roman law which was such an important element in French civil law of the period though it is also used for one part of that work, the *Codex Iustinianus*. The first three books of the *Collectio juris* contain an analysis of articles 1 to 50 of the *Digest*, followed, in the fourth, fifth, and part of the sixth books, by an analysis of the twelve books of the *Codex*. Finally comes the analysis of the 134 *Novellae*, also known as the *Liber authenticorum*. The *Codex* itself, which is the authorised collection of imperial ordinances up to the time of publication, the *Digest*, which is the authorised collection of extracts from the great jurists up to Justinian's time, and the *Novellae*, which is the collection of ordinances passed by Justinian after the *Codex* was published, form together with the *Institutes*, (an outline of the law in clear and simple form), the fabric of the Roman law. It is readily understandable that Montesquieu thought it worthwhile to bring together the notes he had made on this very important subject. The manuscript shows that the notes have been collected and re-numbered for the purpose. The title pages for the books or chapters analysed are sometimes out of order and have sometimes been re-written. A few of the analyses are also out of order. One book of the *Digest* is omitted altogether from the collection, although it seems that Montesquieu had originally made an analysis for he writes at this place: 'mes collections sur le quarantième livre ont été omises comme peu nécessaires n'y étant question que des esclaves'.

It is plain that this work is strictly utilitarian, that is, part of Montesquieu's training as a lawyer. It is, however, interesting to see here the practice, which he continued all his life, of making extensive notes and summaries of writings which he wished to remember. Whether the practice was recommended to him by his masters at Juilly,[2] or by his father, or whether he just evolved it to please himself, it was to prove very useful to him. Indeed, he probably returned to these particular notes when he composed *De l'esprit des lois*. There is a comment in the notice on the *Collectio juris* in the Nagel edition, which scarcely seems justified: 'Contrairement aux volumes des *Pensées* et du *Spicilège* que Montesquieu devait constamment feuilleter, ces notes de droit sont toujours dans un parfait état de conservation, dans leur reliure ancienne'. The excellent state of conservation can be verified, but while the contents of the notebooks are not comparable in interest to the *Pensées* and the *Spicilège*, Montesquieu probably referred to them while he was practising as a lawyer; while in the *Lois*, particularly for Book XXVIII on the development of civil law in France, he probably made use of the *Collectio juris* in connection with the many references to Justinian's great work.

There are just two further remarks before we leave this part of the *Collectio juris*. The first is that it might have been as well to include the notes on slavery, because although information on this subject might be 'peu nécessaire' in eighteenth-century French legal practice, it was necessary to the legal philosopher. Slavery, which had been so common in the ancient world, was still widespread in the modern world, and Montesquieu devotes the whole of Book

[2] Le père Lamy writes: 'Un homme d'esprit se propose une fin, et, pendant une vingtaine d'années, il tire de toutes ses lectures ce qui servira à son dessein; après quoi, il lui est facile de faire d'un ramas si exact et si laborieux un très riche ouvrage' (*Entretiens sur les sciences*, 2nd ed. 1694, p.214).

xv of the *Lois* to the subject of civil slavery, which he defines and condemns in the opening paragraph:

> L'esclavage, proprement dit, est l'établissement d'un droit qui rend un homme tellement propre à un autre homme, qu'il est le maître absolu de sa vie et de ses biens. Il n'est pas bon par sa nature: il n'est utile ni au maître ni à l'esclave: à celui-ci parce qu'il ne peut rien faire par vertu; à celui-là, parce qu'il contracte avec ses esclaves toutes sortes de mauvaises habitudes, qu'il s'accoutume insensiblement à manquer toutes les vertus morales, qu'il devient fier, prompt, dur, colère, voluptueux, cruel.

In the second chapter of Book xv, based on one of the 'pensées'[3] composed between 1721 and 1731, he even returns to Justinian for a description of slavery in the Roman legal system. The topic could no longer be described as of little use to his work.

The other remark is just to draw attention to the only sign of relaxation in the course of these notes on Roman law. This occurs on folio 5 of the first book, and is a list of authors or works of a literary and non-legal character. It is on a blank page and might have been scribbled at any time, but the writing certainly looks much the same as the rest of the book. Here it is:

Molière	*Lettres provinciales*
Corneille	La Bruyère
Racine	Régnier
Montaigne	*Don Quichotte*
Boileau	Mr Fléchier-*Oraisons funèbres*
St. Evremont	La Mothe

It is likely that this list was written in 1711 or a little earlier. Montesquieu was probably in Paris and in any case he would not inherit La Brède with its library until some years later. Many of the authors or works were classics in his own time and it is likely that he was just making a note of books he wanted to acquire. Interestingly enough, the catalogue of La Brède shows that, except for Cervantes' *Don Quixote* and the poems of Régnier, all the authors or works were in fact included in the collection there and at least some of the editions must have been acquired by Montesquieu himself, as they were published after 1716.

The analysis of the *Novellae* ends on f.78 of Book vi, and after a break of a few blank pages, the *Collectio juris* continues from f.83 on rather different lines.

First there are notes, some of them quite extensive, on nine legal cases. Five of these are dated, as shown in the following extracts which either introduce the case or record the decision:

Case 4 Arrêt du . . . . . 1711 [day and month not given] qui ordonne à Mlle de Nicolai de se retourner chez son père. Dépens compensés.

Case 6 Arrêt de la Tournelle en conformité ce 27 juin 1711.

Case 7 Entre l'archevêque de Reims d'une part comme prenant le part et cause dud. Reims, et les moines de l'abbaye de St. Rémi de Reims de l'autre part, ce 12 juillet 1711.

Case 8 La cour par arrêt du 13 juillet 1711 cassa le mariage [et] donna à Elizabeth [de la Prairie] la somme de 600 livres de dommages et intérêts.

Case 9 Une mère ayant fait à sa fille religieuse une donation d'une pension

[3] *Pensées*, Nagel ii (174), 57-58; Pléiade i (1935), 1467-68.

viagère de 400 livres [...] jugé aux Requêtes du Palais le 16 juillet 1711 que la première insinuation[4] suffisait pour tous les deux contrats.

Of the four undated cases, the details show that one was certainly, and two were probably, heard in the *cour des Requêtes du Palais*, and one in the *Châtelet*. One of these cases was heard before 'Mr. l'Avocat-général', as was *Case 4* mentioned above and also *Case 6* where the Advocate General is named as Chauvelin.

At this period the organisation of the *parlement* of Paris and of the provincial *parlements* (all sovereign courts from which there was no appeal) followed the same pattern.[5] *Les Enquêtes* heard appeals referred in writing from lower courts. The *Grand Chambre* heard appeals conducted by advocates and was also the court for cases concerning princes of the blood, the great officers of state, cases concerned with the rights of the crown and those involving 'les causes des villes, des communautés, des corps, des universités'; it was the sole judge of crimes of lèse-majesté. *Les Requêtes du Palais* became a court of jurisdiction for privileged persons – those to whom the king accorded a 'committimus' under the great seal; in practice appeals from this court were made only to the *Grand Chambre*. The fourth chamber, which was staffed by members of the other three, was the *Tournelle criminelle*, which from the fifteenth century onwards exercised jurisdiction in criminal cases. Finally there was the *Assemblée générale* or *Assemblée des chambres* in which, as the name implies, the other chambers united. This was held to register edicts of the king, to prepare remonstrances, and occasionally to hear a charge against a member of the *parlement* itself. The *Assemblée générale* was held in the *Grand Chambre* and only the members of that chamber could take part in discussion, members of the other chambers having voting rights only.[6]

The fact that Montesquieu names these courts in his notes does not in itself indicate whether the cases were held at the *parlement* of Paris or at a provincial *parlement*, such as that of Bordeaux. However, there are certain details which show that the cases were heard in Paris. In one of the undated cases, *No.3* in the notebook, the case in question was heard in the *Châtelet*, which was not one of the sovereign courts, but an important court of first instance in Paris. In *Case 4*, as will be seen, one of the parties was the widow of a gentleman who had held office as *Maître des Requêtes* of the *parlement* of Paris and *Lieutenant civil* of the *Châtelet*. Again, the Chauvelin named as Advocate General in *Case 6* was Germain-Louis de Chauvelin, who in 1711 was Advocate-General of the *parlement*

[4] Legal term meaning registration of a deed or other legal act.

[5] This paragraph is based on the *Manuel d'histoire du droit français* by Henri Regnault.

[6] See also Ford, *Robe and Sword*, p.37: 'The number of [sovereign courts] between 1715 and 1748 remained constant at thirty-one: fifteen parlements (including three provincial councils distinguishable only by name), nine "chambres des comptes", four "cours des aides", two "cours des monnaies" and the "Grand Conseil". They were "sovereign" in the sense that each judged by direct delegation from the king and could be overruled only by his intervention; for the intricate and often ill-defined hierarchy of appeals normally terminated in this highest judicial level, always allowing for action by the king in council.'

of Paris, and who was to become in 1727 Keeper of the Seals and Secretary of State for Foreign Affairs in the ministry of cardinal Fleury.

It is therefore certain that Montesquieu is here reporting cases he attended in Paris. The expressions 'ce 27 juin 1711', 'ce 12 juillet 1711', the more than usually erratic spelling in most of the reports and the conversational style are marks of on-the-spot reporting. He must have attended as an observer only, for it was not until 1714 that he became a counsellor, and then it was at the *parlement* of Bordeaux. Attendance at the courts would have formed a practical part of his training for a legal career and the records form an interesting addition to our knowledge of his first stay in Paris. This probably lasted from 1709 to 1713 and, as professor Shackleton remarks, is the least known period of Montesquieu's life: 'Not a single letter from these years survives, either written or received by Montesquieu, and it is only from isolated comments contained in his notebooks that it is possible tentatively to reconstruct in a very limited way the society in which he lived' (*Montesquieu*, p.8). It is at least possible to say with certainty that in June and July 1711 Montesquieu was attending the Paris courts as an observer and making quite full notes on the cases he heard.

One of these cases is particularly interesting for the light it throws on French society, or rather the family, at that period. Montesquieu's report on it is well presented, with a clear introduction, a summary of the arguments on all sides, and the decision of the Advocate General, set down in a clear, lively manner which indicates that the reporter's own interest was aroused. The transcript is not very long and it seems worthwhile to repeat it here and study it a little more closely. This then is Montesquieu's account:

Entre Mr. de Nicolaï premier président à la chambre des comptes[7] d'une part.

Et Mademoiselle de Nicolaï fille de Mr. le président de Nicolaï et Madame Le Camus veuve de Mr. Le Camus Lieutenant Civil d'autre part.

Le fait est que Mademoiselle de Nicolaï, ayant perdu sa mère, fille de Mr. et Mad. Le Camus, fut donnée par Mr. son père à Mad. Le Camus à l'âge de 2 ans, elle y est restée jusqu'à l'âge de 19 ans. Mr. Le Camus étant mort institua Mademoiselle de Nicolaï sa légataire universelle au préjudice du sieur Marquis de Goussainville son petit fils. Mr. de Nicolaï craignant que sa fille ne charmât sa grandmère comme elle avait fait son grandpère demanda plusieurs fois sa fille à Madame Le Camus qui la lui refusa obstinément tant enfin que par une lettre de Cachet il enleva sa fille. Laquelle ne se comportant bien dans sa maison il la met dans un couvent. Mademoiselle de Nicolaï le fait assigner pour qu'il lui permît de se retirer auprès de son aïeule ou dans un des trois couvents qu'elle lui nommerait.

Ses moyens étaient qu'elle était émancipée, jouïssait de ses droits, payait ses domestiques, qu'à la vérité l'émancipation n'ôtait jamais au père les droits qui lui appartenaient par la nature, tels que l'amour et le respect qu'on lui doit mais que quant aux droits civils le père y renonce par l'émancipation, que Mr. de Nicolaï ne peut autoriser ses

[7] The principal responsibility of the chambres des comtes concerned the king's finances and his domain. 'As courts they exercised sovereign juristiction over disputes arising in connection with the domain and had to verify the accounts of all agencies charged with handling the "royal deniers". As recording depots, they registered edicts bearing on these subjects and maintained the official registers of pensions, gratifications and grants of privileges, as well as the declarations of fealty and homage, "aveux", and "dénombrements" required by feudal law of all who held property of the Crown' (Ford, *Robe and sword*, p.39).

prétensions que sur l'éducation qu'il peut prétendre user en droit de donner à sa fille, mais que les rubriques des titres où il en est parlé de l'éducation nous font bien voir qu'on ne l'a jamais appliquée a l'âge de Mademoiselle de Nicolaï. 'ubi pupilli educari debeant' dit la rubrique du *Code*,[8] 'ubi pupillus educari vel morari debeat' dit celle du *Digeste*.[9]

Le 2e moyen que par une sentence arbitrale rendue entre Messrs. Le Camus et Nicolaï à l'occasion de la restitution de la dite sentence où les parties ont acquiescé, Mr. de Nicolaï ait condoné à laisser sa fille chez Mr. son aïeul. Le 3e moyen que c'est pour aller demeurer chez sa grand-mère qui par la mort de sa fille tient la place de la mère et que quoique les droits du père soient très grands il ne faut pas pour cela anéantir ceux de la mère. Elle concluait à ce qu'il lui fût permis de se retirer chez sa grandmère ou dans un des trois couvents qu'elle nommerait à Mr. son père, qu'elle y pourrait voir ses parents et son Conseil, sortir pour solliciter le procès qu'elle avait avec son père pour le testament de son aïeul.

Madame Le Camus offrait de nourrir et entretenir chez elle sa petite fille, ses domestiques et son équipage gratuitement et sans répétition[10] et pour cela citait un arrêt de Paris par lequel une fille avait été accordée à l'aïeule sur de telles offres au préjudice du père, un autre de Bretagne où l'aïeule avait été préférée à la mère.

Mr. de Nicolaï répond que pour répliquer il n'a besoin que de savoir son catéchisme, que quant à ce qu'on objectait de l'autorité de la mère il n'y a qu'à voir les *Institutes* 'qui ex filia tua nascitur in tua potestate non est, sed in patris ejus'[11] qu'il n'y a jamais eu que Hobbes fameux déiste qui ait osé mettre ces deux autorités en parallèle par l'extravagante raison que la femme contribue plus que l'homme à la formation des enfants,[12] que ce qu'on dit que l'éducation n'était que jusqu'à la puberté n'est pas soutenable, qu'au contraire c'est à l'âge de 18 ou 20 ans qu'on a plus de besoin d'éducation parce que les passions sont plus violentes, que quant à ce qu'on dit que Mademoiselle de Nicolaï est émancipée, cela ne fait rien au fait, d'autant qu'on ne peut étendre les privilèges de l'émancipation plus loin que les lettres ne portent, que ces lettres n'accordent aux fils de famille que le droit de jouïr de ses biens par lui-même, et que par conséquent les autres droits du parent [ne] lui étant pas ôtés lui sont conservés. Conclus à ce qu'il plaise débouter[13] Mademoiselle de Nicolaï de ses demandes.

Et contre Madame Le Camus il dit que les arrêts qu'elle cite ne sont point applicables, que le père était un garçon menuisier qui épousait la fille d'un batteur de ciment. Cette femme mourut lui laissant une fille. L'aïeule offrit de la prendre et entretenir chez elle et de lui donner un métier. Le père qui avait reçu 900 livres de dot, ne se trouvant dans tous ses biens que 300 livres, ne la pouvait restituer, aussi bien loin de pouvoir entretenir sa fille, il était lui-même misérable, ajouté la qualité de garçon menuisier qui n'a point de domicile ce qui en oblige de travailler tantôt d'un côté tantôt d'un autre, est-il surprenant que la cour eût accepté les offres de la mère [*sic*]? Quant à l'arrêt de Bretagne c'était un père qui, mécontent apparemment de sa femme, donna l'éducation de sa fille à sa grandmère. L'arrêt qui confirma le testament et donna l'éducation à l'aïeule, cet arrêt fait pour lui, car il n'a d'autre cause que l'autorité paternelle à qui on donna son effet même après la mort du père.

[8] *Code* or *Codex Iustinianus* v.49 'Ubi pupilli educentur'.

[9] *Digest* XXVII 1.2. 'Ubi pupillus educari vel morari debeat et de alimentis ei praestandis'.

[10] Legal term meaning to sue for payment for expenses incurred.

[11] Justinian, *Institutes*, Lib.I, tit.ix, para.3. For a summary of this aspect of Roman law, see Barry Nicholas, *An introduction to Roman law* (Oxford 1962), p.66: 'The family was thus based on the agnatic relationship, i.e. one traced exclusively through the male line [...] The daughter of a "paterfamilias" is therefore in his "potestas", but her children are in the "potestas" of their father or his "paterfamilias".'

[12] Thomas Hobbes, *Leviathan*, ed. M. Oakeshott (Oxford 1946), part 2, ch.20, p.131.

[13] Legal term meaning to reject a plea.

Mr. l'avocat général dit qu'il ne croyait pas que la Cour doit refuser à Mr. de Nicolaï sa fille, que, si la Cour autorisait la prétension de Mademoiselle de Nicolaï, toutes les jeunes gens passeraient leur jeunesse à courir de collège en collège, de monastère en monastère, que Mademoiselle de Nicolaï ne pouvait tirer aucun usage de son émancipation, que notre émancipation était bien différente de celle des Romains, car comme ils avaient droit de vie et de mort sur leurs enfants que comme des esclaves, tout ce qu'ils acquerraient ils l'acquerraient à leur père, leur émancipation qui était une espèce d'affranchissement les ôtaient entièrement de dessous la puissance de leur père 'emancipatione desinunt liberi in potestate parentium esse',[14] mais qu'il n'en est pas de même de notre émancipation dont l'usage seul n'en est que pour nous rendre capables de jouïr de nos biens.

Quant à la sentence des arbitres il en cite les termes (Messrs. les arbitres, quoi qu'ils connaissent les droits de Mr. de Nicolaï sur Mademoiselle sa fille, cependant pour le bien de la paix ils le prient de laisser les choses dans l'état qu'elles sont) qu'on voit qu'il serait dur de tourner contre Mr. de Nicolaï l'honnêteté qu'il a eu envers Messrs. les arbitres.

Que quant aux autres chefs de demande de Mademoiselle de Nicolaï: qu'elle aura un Conseil – on ne peut point le lui refuser parce qu'elle est émancipée; qu'elle verra ses parents – comme cette famille est fort étendue et qu'il pourrait y avoir des parents éloignés qu'il ne conviendrait pas qu'elle vît, il vaut mieux laisser cet article en la disposition de Mr. son père; qu'elle sollicitera son procès avec son aïeule – qu'il est juste qu'elle sollicite d'autant que sa partie sollicitera, que les sollicitations sont approuvées par l'ordonnance qui permet au juge de solliciter, mais comme Mademoiselle de Nicolaï a commencé par faire ces demandes en justice avant que d'en avoir été refusé de Mr. son père, la Cour en déboutant Mademoiselle de Nicolaï de ses demandes doit y insérer le mot 'quant à présent' afin que si Mr. de Nicolaï était déraisonnable elle peut toujours recourir à la Cour.

Il concluait d'ordonner que Mademoiselle de Nicolaï se retirerait chez son père et la débouter de ses autres demandes quant à présent.

Arrêt du . . . . . 1711 qui ordonne à Mademoiselle de Nicolaï de se retirer chez son père dépens compensés.

It is likely that Montesquieu's attention was caught by this case partly because the issue aroused his sympathetic attention – a young woman of 19, already legally emancipated and named as her grandfather's heiress, appealing to the Court against the authority of a father who had used a *lettre de cachet* to remove her from her grandmother's house to his own – and partly because the people involved belonged to that coterie of families in which legal office was regularly passed from father to son, or uncle to nephew, sometimes over many generations. Montesquieu himself belonged to such a family. In the case he reported on this occasion, the de Nicolaï, the Le Camus, and the Lamoignon (Jean-Aimar de Nicolaï chose a daughter of the Lamoignon family for his second wife) all belonged to families which provided several eminent holders of high legal office.

Looking into the history[15] of the protagonists in this family drama we find Jean-Aimar de Nicolaï, marquis de Goussainville, seigneur d'Ivort, who in 1711 was 61 years old and had held office as *premier président* in the Chambre des comptes of the *parlement* of Paris since 1686. A claim to fame now (though not

[14] Justinian, *Institutes*, Lib.1, tit.xii, para.6. See also C. Accarias, *Précis de droit romain* (Paris 1879), p.236.

[15] Additional information taken from the *Dictionaire de la noblesse*, 3e ed. 1866, p.555 and *Biographie universelle*, xxx.442.

in 1711) is that Voltaire became his ward. He married Marie-Catherine Le Camus in 1690 and before her death in 1696 they had two children, Antoine-Nicolas, born in 1691, and Marie-Catherine-Elizabeth, born in 1692.

The grandfather and grandmother to whose care Marie-Catherine-Elizabeth was confided were Jean Le Camus who lived from 1636 to 1710, brother of the Cardinal Etienne de Camus, and himself a counsellor at the Cour des Aides, maître des requêtes and *lieutenant civil* at the Châtelet in Paris, and his wife, formerly Marie-Catherine Du Jardin. The daughter who married Jean-Aimar de Nicolaï was their only child, and the continuation of the name Marie-Catherine is an indication of the tie between madame Le Camus and her grandaughter.

It seems from Montesquieu's account that there had been some friction previously between m. de Nicolaï and m. Le Camus concerning Marie-Catherine-Elizabeth's place of residence. The matter was serious enough to go to arbitration, and on that occasion m. de Nicolaï had not insisted on his paternal rights.

The legal status of 'emancipation' is alleged on the young woman's behalf. In most of the customs, children reached their majority at the age of 25. Sometimes, however it was found advantageous for minors to be responsible for the management of their own property and then recourse was had to the expedient of emancipation. This is described as follows in one of the standard works of reference, Argou's *Institution au droit français*:

> Les parents paternels et maternels du mineur s'assemblent, ils déclarent que le mineur est capable de gouverner son bien, et qu'il est nécessaire de le faire émanciper. Les parents qui ne peuvent pas se trouver à l'assemblée, envoient une procuration dans laquelle leur avis est inséré; en conséquence de l'avis des parents, le Roi accorde des lettres d'émancipation qui sont scellées en Chancellerie, et qui doivent être entérinées par le Juge Royal du lieu du domicile du mineur. . .
>
> L'effet de ces lettres est de donner au mineur la libre disposition de ses meubles, et des revenus de ses immeubles, mais non pas la faculté d'aliéner ses immeubles. Il faut même créer un curateur au mineur émancipé, pour pouvoir paraître en justice pour les procès qui regardent ses droits immobiliers.[16]

In agreeing to the emancipation of Marie-Catherine-Elizabeth, m. de Nicolaï had therefore accorded her a real measure of independence. At the time (which was probably when she reached the age of 18 but may have been earlier), he could the more easily dispense with his eldest daughter's presence at home, because he had remarried in 1705. The name of his second wife was Françoise-Elizabeth de Lamoignon, daughter of one of the *présidents à mortier* of the *parlement* of Paris, and with her he had another eight surviving children.

It is plain that matters changed when m. Le Camus died, making his granddaughter his 'légataire universelle'. Exactly what this meant in the legal practice of the time, it is difficult to say. For example, in connection with the customary law concerning testaments we read in Argou: 'Quoique le testateur puisse faire des legs particuliers, et même des legs universels, néanmoins ces legs universels ne comprennent qu'une certaine espèce de biens, comme dans

[16] G. Argou, *Institution au droit français*, 8me éd. (Paris 1753), t.i, Book 1, Ch.5, pp.28-30.

la coutume de Paris, les meubles et acquêts et le quint des propres, dont les quatre autres sont réservés aux héritiers du sang.'[17]

Marie-Catherine-Elizabeth was one of the only two direct descendants of m. Le Camus, so that in favouring her the testator either cut out or reduced the inheritance of his grandson, Antoine-Nicolas, eldest son of m. de Nicolaï and already known by the family title of marquis de Goussainville. As he was only 20 in 1711 he was still a minor, and his father presumably acted on his behalf in contesting the grandfather's will. It appears from Montesquieu's account that it was also to safeguard his son's interests that he withdrew his daughter from her grandmother's home.

The Advocate General upheld the father's rights. One cannot say that he acted wrongly in law. The independence conferred by emancipation was, as we have seen, very limited, and the two precedents cited by madame Le Camus seem to have had little relevance. Moreover m. de Nicolaï was still a power in the *parlement* of Paris, whereas his daughter was a young girl and madame Le Camus only the widow of a former *lieutenant civil*. It was probably a forlorn hope to bring the case.

M. de Nicolaï won the decision, although if Montesquieu is right in saying that he acted to prevent his daughter from charming her grandmother as she had charmed her grandfather, it is unlikely that he succeeded by such means. It seems sad to learn that neither Marie-Catherine-Elizabeth nor her brother Antoine-Nicolas lived long enough to escape from their father's domination. The sister died unmarried in 1717, the brother, also unmarried, died in 1731. Jean-Aimar de Nicolaï survived them both, dying in 1737 at the age of 86.

Montesquieu does not comment on the cases he records in the *Collectio juris*, so that we have no means of knowing what he thought of this one. In the *Lettres persanes*, when he can detach his mind from highly coloured fantasies of life in the *sérail*, the message is clear: absolute power exercised by a man over a woman is a form of tyranny and is despicable. Roxane's words to Usbek in the final letter are very moving: 'Comment as-tu pensé que je fusse assez crédule pour m'imaginer que je ne fusse dans le Monde que pour adorer tes caprices? que, pendant que tu te permets tout, tu eusses le droit d'affliger tous mes désirs? Non! J'ai pu vivre dans la servitude, mais j'ai toujours été libre: j'ai reformé tes lois sur celles de la Nature et mon esprit s'est toujours tenu dans l'indépendance.'[18]

In other letters he discusses the matter more lightly and impersonally, and his mind moves so quickly that it is not always certain where his own opinions lie. Letter 38, from Rica to Ibben, is a good example of his manner of debating the issue of equality between the sexes. In the middle of it the case for equality is put in this way:

C'est une autre question de savoir si la Loi naturelle soumet les femmes aux hommes. 'Non, me disait l'autre jour un philosophe très galant: la Nature n'a jamais dicté une telle loi. L'empire que nous avons sur elles est une véritable tyrannie; elles ne nous l'ont laissé prendre que parce qu'elles ont plus de douceur que nous, et par conséquent plus

[17] G. Argou, *Institution au droit français*, t.i., Book II, Ch.12, p.333.
[18] *L.P.* 161, Nagel iC.323; Pléiade i.372.

d'humanité et de raison [...] Nous employons toutes sortes de moyens pour leur abattre le courage; les forces seraient égales si l'éducation l'était aussi. Eprouvons-les dans les talents que l'éducation n'a point affaiblis, et nous verrons si nous sommes si fortes.'

The letter ends, however, with a disclaimer: 'tu vois, mon cher Ibben, que j'ai pris le goût de ce pays-ci, ou l'on aime à soutenir les opinions extraordinaires et à réduire tout en paradoxe.'[19]

In the more measured pages of *De l'esprit des lois* the domination of a man over a woman is treated in much the same way as the domination of one person over a state. That is to say that Montesquieu recognises that the condition exists and is very widespread, he attempts to account for the fact and to explain the rules which govern it. Nevertheless, the right names for the condition are tyranny on the one side and servitude on the other: 'La servitude des femmes est très conforme au génie du gouvernement despotique, qui aime à abuser de tout. Aussi a-t-on vu, dans tous les temps, en Asie, marcher d'un pas égal, la servitude domestique et le gouvernement despotique' (*Lois*, XVI, 9).

In the moderate governments of Europe he thought that wives on the whole had a good deal of freedom, but there is one short chapter on daughters which, in its irony, may be compared with the tour de force on negro slavery. Montesquieu is considering various aspects of the laws in their relation to the number of inhabitants, and he writes: 'Les filles, que l'on ne conduit que par le mariage aux plaisirs et à la liberté, qui ont un esprit qui n'ose penser, un cœur qui n'ose sentir, des yeux qui n'osent voir, des oreilles qui n'osent entendre, qui ne se présentent que pour se montrer stupides; condamnées sans relâche à des bagatelles et à des préceptes, sont assez portées au mariage; ce sont les garçons qu'il faut encourager' (*Lois*, XXIII, 9).

No doubt he was right in the circumstances of his time. Mademoiselle de Nicolaï seems to have had a mind and a heart of her own. All she asked was to stay with her grandmother or in a convent of her own choice, but her father ordered her home and she had to obey. It was perhaps a pity that she never even had the chance to find happiness and freedom in marriage.[20]

There is, as we have seen, a connection between this case reported by Montesquieu and another of the most celebrated names in French literature. In the note on Jean-Aimar de Nicolaï in the *Biographie universelle* (XXX.42) we read:

Le même Nicolaï fut chargé de la tutelle de Voltaire et de son frère aîné par leur père, qui craignait que tous ses biens ne se perdissent après lui par des prodigalités d'un genre différent.[21] Le père alla jusqu'à substituer l'héritage des deux frères Arouet à ce digne

[19] *L.P.* 38, Nagel iC.77-79; Pléiade i.186.

[20] This brief discussion does not, of course, do justice to the complexity of Montesquieu's attitude to women. Descriptions of and comments on their condition are scattered throughout his work. For an interesting introduction to this subject see Sheila Mason, 'The riddle of Roxane' in *Woman and society in eighteenth-century France* (London 1979), pp.28-41.

[21] Allusion to a defiant remark by de Nicolaï to the Regent in connection with the decree of 27 February 1720 banning the keeping of more than 500 livres in gold or silver currency in private homes, to the effect that he intended to keep 'cent mille écus' to offer to the young king on the day he attained his majority because, by the way things were going, the king would have to ask his subjects to subsidise him.

magistrat, son chef, qui les adopta l'un et l'autre, et ne tarda pas à leur rendre la libre disposition de leur fortune. Voltaire conserva toujours pour le nom de Nicolaï la plus tendre reconnaissance et une sorte de piété filiale.

Voltaire's correspondence throws some more light on the connection. Voltaire's father died on 1 January 1722. The only surviving letter in which he mentions his famous son was written to m. de Nicolaï on 20 October 1716. It is not a flattering comment. He writes: 'Peut-être est-il venu jusques à vous, Monseigneur, qu'il a plu au Régent de rappeler mon fils de son exil, qui a été pour moi moins affligeant que ce rappel beaucoup trop précipité, qui va achever de perdre ce jeune homme enivré du succès de sa poésie, des louanges et de l'accueil que lui font les grands, qui, avec le respect que je leur dois, sont pour lui de francs empoisonneurs.'[22] M. de Nicolaï was named as Voltaire's trustee with wide discretionary powers, and the inheritance was finally released on 1 March 1730. It seems that the affair was concluded quite satisfactorily, and that Voltaire did indeed retain a feeling of respect for the Nicolaï family. Letters written in 1740 to Bonaventure Moussinot (Best.D2268, D2288), show that the next marquis de Goussainville, son of the second marriage, who had followed his father into the post of *président* in the *Chambre des Comptes* of the *parlement* of Paris, was then acting as financial adviser to Voltaire. Much later, in a letter from Ferney, dated 28th June 1769, Voltaire writes to 'Aymard Jean de Nicolay, Marquis de Goussainville' in terms which let a real respect appear through the formal courtesy: 'Quoique je n'aie point eu l'honneur de vous faire ma cour depuis trente années mon respectueux attachement pour vous n'a jamais diminué par une si longue absence. Ma vieillesse n'a point affaibli mes sentiments. Je suis dévoué à votre personne et à l'auguste corps auquel votre illustre maison préside depuis deux siècles' (Best.D15706).

It is unlikely that Voltaire knew mademoiselle de Nicolaï, at least in 1711, though he probably heard about the lawsuit. In June 1711 he was not quite seventeen, and had just left the Jesuit College of Louis-le-Grand. He was living in Paris and his father wanted him to follow a legal career. Given the connection between Arouet père and Jean-Aimar de Nicolaï, it is likely that Voltaire heard all about the case almost at the same time as Montesquieu was writing his report.

Returning now to the *Collectio juris*, we find that after the notes on cases attended in Paris there is a break and then comes a section (ff.117-23) entitled 'Extrait de la coutume de Bretagne de Perchambault'. The format resembles the notes on Roman law. There is an analysis of various provisions of the custom of Brittany, in the edition by Perchambault, with occasionally a brief commentary or reference to another authority (e.g. Joly de Fleury on f.118*v* and Cujas on f.120*r*) – Montesquieu does not examine the custom in its entirety, but only certain articles, presumably those to which he attached some particular significance. He notes several articles of the custom which concern the jurisdiction of the Church over ecclesiastics and others and then goes on to a variety of other provisions. Here are some typical notes:

[22] Voltaire, *Correspondence and related documents*, ed. Th. Besterman (Genève, Banbury, Oxford 1968-1977), Best.D43.

f.120*r*. '*sur l'article 13e de la Coutume*':
Si les juges compétents ne poursuivent point le criminel, d'autres juges peuvent faire le procès aux frais et dépens du premier.
f.120*v*. '*article 20e de la Coutume*':
Quand on fait outrage au sergent exerçant son office, les sujets qui le pourront ouïr et secourir et ne l'auront fait seront punissables.
f.121*r*. '*sur l'article 49*':
Cet article veut que les chemins se réparent des deniers des amendes, mais comme les deniers publics [...] sont aujourd'hui employés à autre usage la coutume est d'obliger les propriétaires des terres voisines de faire les petites réparations, les paroisses voisines qui y ont leur passage les médiocres, et les grandes se font des deniers des états, mais pour les chemins qui ne vont pas de ville en ville, que la coutume donne aux seigneurs, la coutume est de les faire réparer par ceux qui ont les terres voisines.

This is all fairly routine but of course even the item on liability for road repairs was important for the management of the countryside, and it is interesting to see how the custom adapted to changing circumstances. This sort of information, stored in Montesquieu's memory, contributed its tiny part to his theories about the way in which the civil law of France had developed.

Perchambault's *Coutume de Bretagne* recurs a little further on in the *Collectio juris* (ff.135-37*r*). A significant note, since it illustrates a concern for wider issues, occurs on f.136*r*. The subject is the burden of proof: 'Dans les faits douteux on doit juger en faveur de l'accusé quand même les preuves du demandeur surmontraient en quelque chose les raisons du défendeur. Car dit Aristote qu'il n'est pas en la puissance du défendeur de plaider quand bon lui semble comme de l'accusateur, et ainsi on ne le suppose pas si prêt à répondre que lui. D'ailleurs il est plus sûr de laisser le coupable impuni que de punir l'innocent. p.77.'

It is permissible to wonder why Montesquieu chose to make notes on the custom of Brittany in particular. It seems likely that his interest was awakened because the author of the edition he is using was himself in the news at about this time. René de La Bigotière de Perchambault was a well known legal expert of the period. He was a *président* of the *parlement* of Brittany and published a number of works concerning the custom of that part of France. These publications included:
Coutume de Bretagne: 1694. (a new edition of a work entitled *observations sommaires sur la Coutume de Bretagne*, which he had published under the name of Pierre Abel, avocat, in 1689).
Commentaire sur la coutume de Bretagne: 1693.
Institution au droit français par rapport à la coutume de Bretagne: 1693.
Factum pour savoir si l'usage permet aux tuteurs de colloquer les deniers pupillaires à l'intérêt: 1709.
A second 'Factum' on the same subject: 1713.
It seems that Perchambault was treading on delicate ground. He was attacked in a work published in 1710 by J. A. de La Gibonais, particularly for his discussion of usury, and in 1713 the Faculty of Nantes also published a refutation. This was followed by a new work by Perchambault and a new attack by the abbé Ecolasse, who satirised the author as well as his work. Perchambault started a lawsuit for calumny but it seems from the notice in the *Biographie universelle* (xxxii.451-52) that he got the worst of it:

L'affaire se poursuivait de part et d'autre avec beaucoup de chaleur; on s'accusait réciproquement de fabrication, quand le gouvernement crut devoir arrêter la procédure. Ecolasse avait dressé des mémoires en sa faveur; ces mémoires furent publiées à Trévoux 1714 sous le titre de *Préjugés légitimes contre les livres de M. de Perchambault* où celui-ci est fort maltraité. On trouve à la fin un Mémoire d'Ecolasse, envoyé en mars 1713 aux docteurs de la Sorbonne; ce mémoire consiste en huit extraits de différentes propositions tirées des ouvrages de Perchambault, avec les jugements des docteurs consultés, qui étaient Habert, Lemure, Léger, et le p. Pouget. Ces extraits sont terminés par une lettre du docteur Habert à Ecolasse, en date de 26 mars 1714, on y loue le zèle d'Ecolasse et on y parle des écrits de Perchambault comme de productions hardies et dangereuses.

Montesquieu was in Paris until the end of 1713, and it seems likely that his interest was aroused by the quarrel and that he decided to have a look at the Perchambault version himself. The notes he made do not seem to be on particularly controversial matters, though possibly the article on burden of proof might be regarded as dangerous doctrine in early eighteenth-century France. Louis XIV was still alive when the Sorbonne pronounced its verdict. About forty years later, in the 1750s, the Sorbonne gave its attention to *De l'esprit des lois*. There seems to have been an intention to censure certain of its propositions but the slow procedure was overtaken by the renown of the work and, in the event, the censure was never published.[23] Perhaps Montesquieu during this time was able to spare a thought for the less fortunate Perchambault.

After about fourteen pages of the custom of Brittany, there is a break with a few blank pages and then the *Collectio juris* continues from f.131*r* with notes on 'Maximes de droit du plaidoyer de l'avocat général'. A *plaidoyer* is a collection of speeches made by counsel for the defence and the text relates to Roman law as practised in France. It is interesting to look at a few of the notes. An early entry (f.131*r*) reads: 'La prescription[24] de 20 années pour les crimes a été introduite pour deux raisons. La 1ère que toute punition ou peine est odieuse et par conséquence sujette à restriction. La 2e, qu'on suppose qu'un homme qui a porté pendant 20 ans dans son cœur le remords de son crime est assez puni.' On the reverse of the same page, Montesquieu notes: 'C'est une règle qu'en France on n'admet aucune prescription romaine si elle n'est autorisée par une constitution royale.'

A little later (f.133*r*), there is a practical instance of how the application of Roman law may be modified by other considerations:

Les donations faites à une personne avec laquelle on a été en débauche étaient permises par le droit romain [the reference is given: *Digest*, xxiv, 1-3], mais on peut dire que notre droit français et le christianisme réprouvent ces donations. Comme elles sont réprouvées entre mari et femme à cause de l'empire que l'un a sur l'esprit de l'autre, on doit à plus forte raison les réprouver entre des gens qui ont un mauvais commerce, dans ce cas l'empire est bien plus fort. Aussi par arrêt de Paris de l'an 1662 rapporté par monsieur Rican, traité des donations, il fut jugé selon ces principes. C'était deux personnes qui avaient eu un mauvais commerce ensemble et s'étaient ensuite mariées. L'un deux fit une donation à l'autre. Monsieur l'avocat général alors dit que cette donation pouvait se considérer de deux manières: ou comme faite entre deux conjoints et par conséquent nulle par les lois, ou comme faite entre deux personnes qui avaient mauvais commerce

[23] R. Shackleton, *Montesquieu*, pp.368-70.

[24] Limit of time in which a prosecution may be brought.

ensemble, dans quel cas cette donation était encore nulle par les règles du droit français. La cour infirma la donation. D'ailleurs l'ordonnance de 1539 est en quelque façon contraire à ces donations. De plus les coutumes de Maine, d'Anjou et de Touraine les prohibent expressément.

Further on, Montesquieu indicates that the *plaidoyer* he is using is that of the advocate general Joly de Fleury. This particular member of a famous legal family was Guillaume-François Joly de Fleury, who lived from 1675 to 1756. He became advocate general in the Cour des aides in 1700 and in the *parlement* of Paris, in succession to his father, in 1704. He moved on in 1717 to become Procurator General in succession to d'Aguesseau when the latter was promoted to the position of chancellor of France. Joly de Fleury was famous, during his time as Advocate General, for his *plaidoyers* and other productions, as we read in a biographical notice (*Biographie universelle*, xiv.238):

Nourri d'études solides, il put suffire aux plaidoyers, aux harangues, aux requisitoires, aux mercuriales, at aux nombreux discours qu'il était obligé de prononcer: telle était sa facilité, que toutes ces pièces étaient aussi soignées que s'il eut eu beaucoup de temps pour les composer; et l'on ne savait qu'y admirer le plus, de l'éloquence qui y régnait, ou de la justice du raisonnement; de l'ordre et de la précision d'idées, ou de la profondeur des recherches.

Montesquieu heard Joly de Fleury in court. One of his comments on Perchambault's edition of the custom of Brittany reads (f.118*v*): 'Question sur les actions hypothécaires – il dit ici qu'elles sont personnelles (n'étant proprement qu'une date pour que les obligations soient acquittées avant celles qui lui sont postérieures) et par conséquent ecclésiastiques. J'ai cependant entendu plaider le contraire à monsieur l'avocat général Joly de Fleury.

It appears that Montesquieu chose a good mentor. From the circumstance that when he refers to him it is as 'Mr l'avocat-general fleuri (or joli de fleuri)', it is very likely that the notes were written before Joly de Fleury became procurator general in 1717. This accords well with the dating in the *Collectio juris*. Here it is interesting to see that over thirty years later Montesquieu met Joly de Fleury in person apparently for the first time, and both liked and respected him. Writing in February/March 1749 to Serilly, he says: 'Je vous prie, quand vous écrirez à M. le Procureur général, de lui faire un peu ma cour. J'eus l'honneur de passer une ou deux heures bien délicieuses avec lui chez M. Gendron; je me trouvais près du grand homme dont la renommée m'avait tant parlé. J'ai eu, pendant quelque jours, l'idée de lui faire un petit présent; j'ai jugé ensuite que cela n'était pas à propos' (*Correspondance*, Nagel iii.1195).

De l'esprit des lois had appeared for the first time in 1748, published in Geneva. A second edition was being prepared in Paris in 1749 by Huart and Moreau fils, and we learn from two letters from the firm to Montesquieu, 8 January 1749 and March 1749 (Nagel iii.1160, 1198), that the chancellor d'Aguesseau gave permission for the work to appear provided that it did not seem to have been printed in Paris (in fact the title page reads 'Genève, chez Barillot et fils'). It may have been on account of these delicate negotiations that Montesquieu thought of making a present to the Procurator General. We may feel relieved that he resisted the impulse, not worthy of a famous man who was himself a

lawyer and who owed part of his own legal training to the example of Joly de Fleury.

In the middle of f.135*r* the notes on the maxims cease and there is a return to Perchambault's *Coutume de Bretagne*. This continues until the middle of f.137*r* when there is a short reference to another *plaidoyer* by the Advocate General Lamoignon. Here again the authority is a member of a famous legal family. The particular member to whom Montesquieu refers is Guillaume de Lamoignon, seigneur de Malesherbes who lived from 1685 to 1772. He was the second son of the *président* Chrétien François Lamoignon and father of the famous Malesherbes. He himself was advocate general at the time of these notes and later became *président* of the *parlement* of Paris, *premier président* of the cour des aides and eventually chancellor of France (*N.G.B.*, xxix.230).

After this, from f.137*v*, the notes concern a collection entitled *ordonnance criminelle* by Bouvier, starting with a distinction between those cases which concern the king's authority and those in which the state acts on behalf of the public. The distinction is expressed succinctly: 'Il faut bien distinguer les cas qui regardent l'intérêt du Roi d'avec ceux qui regardent l'intérêt public dont la poursuite appartient au procureur fiscal qui en est chargé.'

Eventually on f.140*r* there is the first link between theory and practice. This is dated, as we should expect, 1716, the year when Montesquieu took office, in July, as *président* of the *parlement* of Bordeaux. Indeed he may well have noted it down because it was the first, or one of the first cases which came before him as a magistrate.

The point of law concerns release on bail and is introduced thus: 'Il est dit dans l'ordonnance criminelle (titre 13e des prisons) que lorsqu'il n'y a point d'appel par la partie publique des sentences d'absolution les geoliers sont obligés de mettre les absous dehors dans les 24 heures.' He continues: 'Nous avons jugé en Tournelle en 1716 que cet article ne s'appliquait pas dans le cas d'un élargissement fait en païant caution [bail].' The reason was that the order to release was of an interlocutory or temporary, not definitive, status, and he goes on to note that although the state seems to have its interests safeguarded by the bail, nevertheless the position is better when the prisoner is confined, particularly since the confession of the accused would enable the state to establish the truth more easily. From what follows, it seems that this decision was reversed, unless possibly another case was involved. He says: 'Nous jugeâmes cependant le contraire le 1er de juillet de cette année 1716.' The reason given is that the bail had been received (by the state) by direction of the court (*appointement*), and that the state, which had appealed against the order to release on bail, had not appealed against the order to receive bail. A nice legal point seems to be involved. Possibly the reasoning behind the second decision was that the state ought not by appealing against the release of a prisoner, to frustrate the decision of the court to grant bail.

This first case is followed by notes on several others. It seems that Montesquieu thought it worthwhile to note down the decisions on a number of doubtful points of law. We read, f.140*v*: 'L'an 1716 j'ai vu décider à la Tournelle où je servais que les parents d'un seigneur haut justicier peuvent être jugés dans les procès criminels fait au nom dudit seigneur', and then comes a résumé of the reasons.

There follow notes of decisions taken on similar doubtful issues in March, probably of the year 1717. The court in question is not specified in the first case, but in the second Montesquieu mentions that he saw the affair decided at the *assemblée des chambres*.

Immediately after this case, and on f.141v to f.142r, there comes a note of the visit paid by the duke of Berwick, then military governor of Guyenne, to the *parlement* of Bordeaux, on the occasion of its opening session of 12 November 1717.[25] This is by no means a full report of the occasion, but just a note of one particular aspect of it involving a point of precedence and of courtesy by the duke which took Montesquieu's fancy. It is short enough to be quoted in full:

> L'an 1717 le parlement s'assembla à l'ordinaire le lendemain du St. Martin[26] pour l'ouverture à laquelle le maréchal de Berwick commandant de la province assista, mais quoi qu'il fût déjà entré trois fois au parlement et qu'il eût toujours passé après les présidents à mortier et eût suivi jusque dans la chambre du Conseil, cependant il passa ce jour-là par le côté des fenêtres. La compagnie pria monsieur le premier président d'avertir monsieur le maréchal de cette nouveauté, qui dit à monsieur le pp. qu'il était fort fâché d'avoir passé par distraction par un autre chemin que celui qui était usité et qu'il en demandait excuse à la Compagnie et que comme le mal avait été fait en public il le réparerait aussi en public et qu'il chercherait occasion de se rendre au parlement pour cela. En effet, le lundi 22 novembre le parlement ayant quelque édit à enregistrer, monsieur le maréchal se rendit à l'audience et passa par le côté ordinaire.

It seems that a certain affectionate respect for the duke of Berwick prompted Montesquieu to record this episode. He remained on terms of friendship and correspondence with Berwick during the duke's lifetime, and then, after the latter's death in 1734, he was entrusted by the family with the task of editing the memoirs he had left. Montesquieu never managed to accomplish this task, and after his own death the papers were found, together with an outline of a historical eulogy which he had sketched. The memoirs and this sketch were eventually published in 1778. It is pleasant to read the reference to the command which brought the two men together: 'Le roi mourut le premier de septembre 1715: M. le duc d'Orléans fut régent du royaume. M. le maréchal de Berwick fut envoyé commander en Guyenne. Me permettra-t-on de dire que ce fut un grand bonheur pour moi, puisque c'est là que je l'ai connu' (Nagel iii.392, Pléiade ii.1229).

A little further on in the eulogy Montesquieu writes: 'Lorsqu'il fut nommé commandant en Guyenne, la réputation de son sérieux nous effraya; mais à peine y fut-il arrivé, qu'il y fut aimé de tout le monde; et il n'y a pas de lieu où ses grandes qualités ont été plus admirés ...' (Nagel iii.393-94, Pléiade ii.1231).

When writing this he had no doubt many memories of the Duke and, among them, of the seriousness with which he treated a matter of protocol, at which others might have laughed, at the *parlement* of Bordeaux in 1717.

The next item in the *Collectio juris*, from f.142*v*, consists of notes of some 'conférences tenues par messieurs les Commissaires du Roi et messieurs les députés du parlement etc.'

These discussions appear to have centred on certain ordinances of the kings

[25] See also R. Shackleton, *Montesquieu*, p.19

[26] St Martin's day is on 11 November.

of France. There are references to 'l'ordonnance d'Orléans', 'l'ordonnance de Charles 7', 'Philippe le Bel en 1344 . . .' etc. In chapter 45, at the end of Book XXXVII of the *Lois*, when Montesquieu has traced the development of French civil law to the time when it began to approximate to the law of his own period, references to the ordinances occur again, and he speaks of the reigns of Charles VII (1422 to 1461) and his successors as the 'grande époque' when the various customs were written down, became more general and received the royal authority. Here is a link between the young magistrate who, probably in 1718, attended these legal seminars, and the master who in 1747/48 composed the book whose title indicates its grand design: 'De l'origine et des révolutions des lois civiles chez les Français.'

The collection terminates with a further selection of notes concerning legal cases or points of law. The connecting thread in the legal cases appears to be the question of the jurisdiction of the court. The two cases which are dated illustrate the direction of interest. The first (f.144*v*) begins: 'Ce 10 mai 1719 il a été jugé en Tournelle sur le conte du Lieutenant criminel de Saintes qu'un Lieutenant criminel est bien fondé à demander son renvoi en grand chambre...'

The second (f.145*r*) concerns a brawl which occurred on a river bank when one Michel Des Isles struck his adversary, who was an advocate, several blows with his stick. Montesquieu writes:

> L'affaire étant portée aux Eaux et forêts et décrétée, la table de marbre[27] cassa la procédure comme faite par juge incompétent et sur l'appel en tournelle nous confirmâmes le jugement de la table de marbre sur ce principe que les eux et forêts ne sont juges que des délits faits à l'occasion d'une malversation dans l'exploitation des forêts et quand ils se font à l'occasion de ce qu'on gâte le lit des rivières et qu'on empêche la navigation ainsi ils ne conviscent[28] des crimes qu'accessoirement, conformément à l'article 8 de leur ordonnance, encore faut-il que le crime en ce cas ait été commis dans la forêt ou sur la rivière ou les bords. Cela fut jugé en mai 1721.

There are only a few more short undated entries in the *Collectio juris*, but included among them are two concerning the *question*. These are a reminder that torture was still an accepted part of the judicial process in France and had its own rules of procedure.

More than thirty years later Montesquieu devoted the short chapter 17 of Book 6 of the *Lois* to the subject: 'de la torture ou question contre les criminels'. He argues that it is not necessary to the law; that a civilised nation, the English, have rejected it without suffering thereby and he concludes: 'Tant d'habiles gens et tant de beaux génies ont écrit contre cette pratique que je n'ose parler après eux. J'allais dire qu'elle pourrait convenir dans les gouvernements despotiques, où tout ce qui inspire la crainte entre plus dans les ressorts du gouvernement; j'allais dire que les esclaves chez les Grecs et chez les Romains [...] Mais j'entends la voix de la nature qui crie contre moi.'

Robert Derathé comments on this: 'C'est une élégante façon de se dérober'[29]

[27] The *maîtres des eaux et forêts* held jurisdiction within their designated area, and *la table de marbre* was a tribunal which heard appeals from this court.

[28] Presumably a form of 'convainquent'. 'Convaincre' meant to 'convict' as well 'to convince'.

[29] Ed. *Lois* (Paris 1973), i.436.

and refers to a more open condemnation of the *question* in the *Pensées*.[30] However, the condemnation in the *Lois*, though subtle, is compelling. Would any of the readers of the *Lois* take pleasure in thinking that France was a despotism and that they were slaves? Yet they knew that suspected criminals were still put to the question. If they were still ready to think that the end justified the means, they were answered by the grave conclusion 'Mais j'entends la voix de la nature qui crie contre moi.' Perhaps Montesquieu had heard, not the voice of Nature, but a human voice crying when, probably in 1721, he wrote in the *Collectio juris* (f.146 *r*): 'quand après la question ordinaire et extraordinaire sans [? découvrir] les preuves, les jurats, faute d'aveu, condamnent aux galères perpetuelles, il faut qu'ils mettent pour le cas résultant du procès, car ils ne sauraient pas procéder par atteisne[31] et convaincre, à cause du déni de l'accusé'.

As always in this strictly practical notebook, Montesquieu refrains from any comment, but it is certain that he was familiar with the practice of the *question*, since nearly the whole of his career as a magistrate was spent in service in the criminal court, the *Tournelle*.[32]

Two more short entries occur after this, both concerning points of criminal law, and that is the end of the collection.

The notebooks have a certain intrinsic interest in that they are concerned with the complexity of legal practice in France of the ancien régime, about a hundred years before the law was systematised in a series of codes after the Revolution. French law is considered under several aspects:

1. *Roman law*	
the *Digest*	Books I, II and III
the *Code*	Books IV, V and part of VI
2. *Customary law*	*Book vi*
The custom of Brittany in the edition of Perchambault	ff.117*r*-123*v* and 135*r*-137*r*
3. *Defence pleas*	
Maximes de droit from the *plaidoyer* of Advocate General Joly de Fleury	ff.131*r*-135*r*
4. *Criminal law*	
Ordonnance criminelle of Bouvier	ff.137*r*-140*v*
5. *Protocol of the parlement*	
the duke of Berwick's visit to the *parlement* of Bordeaux in November 1717	ff.141*v*-142*r*

[30] Pensées, Nagel ii (643), 202-203; Pléiade i (1954), 1475-76.

[31] A form of the word 'atteint'. See the definition of this word in the *Dictionaire universel* of Antoine Furetière (La Haye, Rotterdam 1690; reprinted 1978): 'En termes du Palais, on déclare qu'un homme est *atteint* et convaincu du crime, dans le jugement que le condamne. Il faut remarquer qu'il y a de la différence entre ces mots *atteint* et *convaincu*, en ce que le mot d'atteint se dit seulement d'un accusé contre lequel il y a simplement des indices, ou des preuves imparfaites; ce qu'on dit autrement, *être prévenu de crime*: au lieu que le mot de *convaincu* se dit de celui contre lequel il y a une preuve claire et certaine.'

[32] J. Dalat, *Montesquieu magistrat*, pp.47-54 and 114-17.

6. *Royal ordinances*
   discussions between the king's commissioners and the deputies of the *parlement* — ff.142*v*-144*v*
7. *Case law*
   points from:
   i. cases observed by Montesquieu in Paris, some certainly and all probably in 1711 — ff.83*r*-109*v*
   ii. cases attended by Montesquieu as a magistrate in Bordeaux in 1716-17 — ff.140*v*-141*r*
   iii. more cases, some certainly and all probably attended by Montesquieu as a magistrate in Bordeaux in 1719-21 — ff.144*v* to 146*v*

During this examination of the *Collectio juris* it has emerged that there are several links between these notes, some of which are not much more than hastily jotted down, and Montesquieu's life and work. Careful examination might reveal many more connections but even this short study shows that we have in this collection the writer's own outline record of one aspect of his formation. It is an important aspect, for the studies of French law recorded here, dry and detached as they appear, most probably helped to arouse in Montesquieu the interest and the enquiring spirit which led him eventually to seek out the spirit of the laws of all nations.

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